89-1849

No. _____

MAY 29 1990

SUPREME COURT OF THE UNITED STATES

October Term, 1990

In re GERALD E. MANSELL

GERALD E. MANSELL, *Petitioner*,
v.
GAYE M. MANSELL, *Respondent*

Petition for Writs of Mandamus or Certiorari to the Court of Appeal of California, Fifth Appellate District, and the Honorable James Ardaiz, William Stone, and George Brown, Justices of the Court of Appeal of California, Fifth Appellate District, or
for
Entry of Judgment by this Court

Petition for Writs of Mandamus, Certiorari, or for Entry of Judgment

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QUESTIONS PRESENTED

1. Whether California's "reinterpretation" of its original opinion is a sophistic subterfuge to disobey this Court's mandate, to evade this Court's jurisdiction, and to usurp federal jurisdiction and divide Petitioner's Veterans Administration Disability Benefits without subject matter jurisdiction.

2. Whether California's non-compliance with this Court's mandate should be remedied through entry of judgment by this Court.

3. Whether California may characterize and divide Veterans Administration Disability Benefits as community property upon dissolution of marriage despite the anti-attachment protections of 38 U.S.C. §3101, which positively require by direct enactment that the disabled veteran actually receive the benefits.

PARTIES

a. Petition for writ of mandamus or entry of judgment:

GERALD E. MANSELL, *Petitioner*, and
THE COURT OF APPEAL OF CALIFORNIA, FIFTH APPELLATE DISTRICT, and the Honorable JAMES ARDAIZ, WILLIAM STONE, and GEORGE BROWN, Justices of the Court of Appeal of California, Fifth Appellate District, *Respondents*.

b. Petition for writ of Certiorari:

GERALD E. MANSELL, *Petitioner*,
GAYE M. MANSELL, *Respondent*.

c. Since Petitioner contends that application of California Civil Code §4800(a) to divide his Veterans Administration disability compensation as community property offends Art. VI of the United States Constitution, 28 U.S.C. §2403(b) may be applicable, and the Attorney General of the State of California is being served pursuant to Rule 29.4(c) of this Court.

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Senate Report No. 98-174, pp.221-222, S.675, D.O.D. Auth. Act of 1984, Pub. L. 98-94 21,23

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Interlocutory Judgment of Dissolution of Marriage, (Civ. No. 55594), filed May 29, 1979 (Clerk's Transcript, Pages 3 to 5 [C.T. 3-5], set forth in full in Appendix A [App.A]).

Superior Court of California for the County of Merced denial of Appellant's Motion for Modification of Judgment dated August 10, 1983 (C.T.93, App.B).

Superior Court's Denial of Reconsideration, dated August 10, 1983 (C.T.94, App.C).

California Court of Appeal for the Fifth Appellate District unpublished Opinion, (No. 5Civ F002872), dated January 30, 1987 (App.D).

California Supreme Court denial of Review, (No. S000361), dated April 29, 1987 (App.E).

United States Supreme Court Opinion, *Mansell v. Mansell*, (No. 87-201) ___ U.S. ___, 109 S.Ct. 2023, 104 L.Ed.2d 675 (May 30, 1989), (App. F).

California Court of Appeal for the Fifth Appellate District published Opinion, *Mansell v. Mansell*, 216 Cal.App.3d 937, reprinted as modified, 217 Cal.App.3d 219, 265 Cal.Rptr. 227 (Feb., 1990), (App. G).

California Court of Appeal for the Fifth Appellate District denial of Rehearing, (5Civ F002872), dated January 17, 1990 (App. H).

California Supreme Court denial of Review, (S000361), dated March 29, 1990 (App. I).

JURISDICTIONAL GROUNDS

Under the Supremacy Clause, United States Constitution, Article VI, Clause 2, federal law must prevail. However, the California courts have refused to acknowledge that 38 U.S.C. §3101 prevents the states from awarding Veterans Administration (V.A.) Disability Benefits to former spouses as community property upon dissolution of marriage, even though this Court has held that the exact same language as §3101, as well as other similar federal statutes, absolutely pre-empts state power, in the fundamental, subject-matter jurisdictional sense, to treat these federal benefits as community property.

In *Mansell v. Mansell*, (No. 87-201) ___U.S. ___, 109 S.Ct. 2023, 104 L.Ed.2d 675 (May 30, 1989), this Court held that the Former Spouses Protection Act, 10 U.S.C. §1408 (FUSFSPA), does not grant state courts the power to treat, as property divisible upon divorce, military retirement pay that has been waived to receive veterans disability benefits. No other federal statute grants subject matter jurisdiction over veterans disability benefits to the states in divorce cases. The *Mansell* Court found that because §1408 precludes community property division of V.A. disability compensation, it was unnecessary to decide whether §3101 independently protects veterans' disability benefits from the claims of former spouses (No. 87-201, p.5, n.6).

Nevertheless, 38 U.S.C. §3101 absolutely pre-empts state subject-matter jurisdiction over veterans benefits in

divorce cases. However, on remand, and in defiance of this Court's mandate, the California Court ordered division of petitioner's veterans disability benefits as community property under California Civil Code §4800(a). The state Supreme Court denied review on March 29, 1990.

Petitioner therefore seeks review of the California Court of Appeal Opinion dated December 18, 1989, dividing his Veterans Administration Disability Benefits as community property (App.G).

This Court's jurisdiction is invoked under 28 U.S.C. §1651(a) and *Ward v. Love County*, 253 U.S. 17 (1920), *Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120 (1945), and *Terre Haute & I.R. Co. v. Ketcham*, 194 U.S. 579 (1904) to remedy California's obvious subterfuge to evade this Court's jurisdiction and to evade federal pre-emption of subject-matter jurisdiction over petitioner's Veteran's Administration disability compensation.

This Court's jurisdiction is also invoked under 28 U.S.C. §1651(a) and *Dean v. Hickman*, 358 U.S. 57 (1958), and *Bucolo v. Adkins*, 424 U.S. 641 (1976), to remedy California's non-compliance with this Court's mandate. No other court has the power *(In re Sanford Fork & Tool Co.*, 160 U.S. 247, 255 (1895)).

This Court's jurisdiction is also invoked under *Martin v. Hunter*, 1 Wheat 304, 4 L.Ed. 97 (1816) and *Cook v. Porter*, 11 Wall 672, 20 L.Ed. 84 (1871), to enter judgment, which California declines and refuses to enter.

This Court's jurisdiction is invoked under 28 U.S.C. §1257(a) and *Wissner v. Wissner*, 338 U.S. 655 (1950),

Hisquierdo v. Hisquierdo, 439 U.S. 572 (1979), *McCarty v. McCarty*, 453 U.S. 210 (1981), *Rose v. Rose*, 481 U.S. 619 (1987), and *Mansell v. Mansell*, Slip Op. 87-201 (May 30, 1989) to vindicate petitioner's Veterans Administration disability compensation.

This petition is being filed within 90 days of the California Supreme Court's denial on March 29, 1990, of the appellant's Petition for Review.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Supremacy Clause, United States Constitution, Article VI, Clause 2 provides:

> **Supreme Law of Land**
> "The Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

Title 38 U.S.C. §3101 is set forth in full in Appendix J. This anti-attachment statute provides, in relevant part:

> **Nonassignability and exempt status of benefits**
> "(a) Payments of benefits due or to become due under any law administered by the Veterans' Administration **shall not be assignable except to the extent specifically authorized by law, and such payments made to, or on account of, a beneficiary shall be exempt from taxation, shall be exempt from the**

claim of creditors, and shall not be liable to attachment, levy, or seizure by or under any legal or equitable process whatever, either before or after receipt by the beneficiary. **"** (emphasis added).

This case also involves the following Statutes and Rules, which are set forth in full in Appendix J because of their length:

5 U.S.C. §8345(j)
10 U.S.C. §1408
28 U.S.C. §1257(3)
28 U.S.C. §1651(a)
38 U.S.C. §310
38 U.S.C. §314
38 U.S.C. §315
38 U.S.C. §355
38 U.S.C. §3012[b][2]
38 U.S.C. §3105
42 U.S.C. §659
42 U.S.C. §662[c]
Calif. Civil Code §4800(a)
Calif. Rule of Court 28(e)
Calif. Rule of Court 977

STATEMENT OF THE CASE

The marriage of the parties was dissolved by an Interlocutory Judgment of Dissolution of Marriage filed May 29, 1979 (App.A). Paragraph 6 of the Judgment provides:

> "6. Respondent [husband] shall make an allotment to Petitioner [wife] in an amount equaling fifty percent (50%) of the gross retirement pay and compensation from the Veterans Administration accrued through Respondent's employment with the United States Air Force, * * * * "(App.A, p.A-3).

On May 13, 1983, Major Mansell filed a motion to modify the judgment by deletion of paragraph 6 (C.T.40). He argued, *inter alia*, that under the Supremacy Clause of the United States Constitution, the states were precluded from dividing his V.A. benefits as community property by 38 U.S.C. §3101 (C.T.41). The trial court denied the motion for modification (App.B).

Major Mansell appealed to the California Court of Appeal for the Fifth Appellate District. Once again, he argued that under 38 U.S.C. §3101 state courts did not have subject-matter jurisdiction over V.A. benefits (Appellant's Opening Brief in the Court of Appeal, filed September 26, 1984, pp. 4 and 8).

> ". . . the provisions of 38 U.S.C. §3101 prohibit assignments of [V.A. disability benefits] and exempts them from claims of creditors, whether by attachment, levy or seizure, either before or after receipt by the beneficiary." (Appellant's original Opening Brief, filed Sept. 26, 1984, page 4, lines 23-27).
>
> ". . . .
>
> "[V.A.] Disability Compensation is not subject to assignment and is exempt from seizure by or under any legal or equitable process whatever, either before or after receipt by the beneficiary [citing §3101 as pre-empting community property division of V.A. disability benefits]. (Appellant's original Opening Brief, filed Sept. 26, 1984, page 8, lines 4-17).

Petitioner's ex-wife argued that it was too late for petitioner to appeal and that he could not appeal because the original judgment was founded upon a stipulation. The

Court of Appeal rejected both of these arguments and determined that it was required by California law to decide the case on the merits (App.D.pp.6 to 8). Petitioner's ex-wife did not cross-appeal under California Rule of Court 28(e)(5) to preserve her objections to petitioner's standing to seek review of the federal pre-emption issues.

On January 30, 1987, the Court of Appeal affirmed denial of modification (App.D). The great bulk of the Appellate Court Opinion is devoted to a discussion of this Court's decision in *McCarty v. McCarty*, 453 U.S. 210 (1981), and how it was affected by 10 U.S.C. §1408 (FUSFSPA). The Appellate Court also briefly addressed some of the other issues raised by the Appellant. However, the Opinion is completely silent concerning federal pre-emption under 38 U.S.C. §3101 (App.D). Nevertheless, petitioner had preserved and argued the federal pre-emption issue in the trial court and in his Opening Brief in the Court of Appeal (Opening Brief, filed September 26, 1984, pp. 4 and 8).

Major Mansell then sought review in the California Supreme Court. In his Petition he tried to focus the Court's attention on the federal pre-emption issue by expressly limiting his argument to the proposition that division of V.A. Disability Benefits as community property violates 38 U.S.C. §3101. However, the California Supreme Court refused to hear the case, and on April 29, 1987, denied Review. The California Supreme Court did not issue an opinion (App.E).

Major Mansell timely appealed to this Court. Federal subject-matter jurisdiction pre-emption was the main point argued in the Jurisdictional Statement and in the Opening Brief on the merits (see *Question Presented*). On May 30, 1989, this Court reversed and remanded for further proceedings not inconsistent with its Opinion (App.F p.13).

On December 18, 1989, the California Court of Appeal reinstated its original disposition by evading the federal pre-emption question (App.G). Petitioner timely sought reconsideration upon the ground that the Court of Appeal failed to address the federal pre-emption question under 38 U.S.C. §3101(a), even though the Opinion expressly recognized that federal pre-emption would preclude division of petitioner's veteran's benefits. Rehearing was denied on January 17, 1990 (App.H).

On January 29, 1990, petitioner filed a timely Petition for Review in the California Supreme Court. Petitioner asserted that the Opinion of the Court of Appeal should be reviewed because it failed to follow the mandate of this Court (Pet. Rev., pp. 7, 11, and 12); because it failed to address the question of federal pre-emption under the anti-attachment provisions of §3101 which was raised and preserved at every stage of this case (Pet. Rev., pp. 5-12); and because the Court of Appeal's Opinion was a sophistic attempt to circumvent this Court's jurisdiction and mandate, undermined public confidence in the judicial system, and rendered federal pre-emption a meaningless platitude in California (Pet. Rev., pp. 12-13).

The California Supreme Court denied review on March 29, 1990 (App.I).

REASON FOR GRANTING A WRIT OF MANDATE

A WRIT OF MANDATE SHOULD ISSUE BECAUSE PETITIONER HAS NO OTHER REMEDY FOR CALIFORNIA'S BLANTANT REFUSAL TO FOLLOW THIS COURT'S MANDATE

In *Mansell v. Mansell*, (No. 87-201) ___U.S. ___, 109 S.Ct. 2023, 104 L.Ed.2d 675 (May 30, 1989), this Court held that the Former Spouses Protection Act, 10 U.S.C. §1408 (FUSFSPA), does not grant state courts the power to treat, as property divisible upon divorce, military retirement pay that has been waived to receive veterans disability benefits. In so holding, this Court observed, in Section II of the Opinion, starting at page 5, that:

> "It is clear from both the language of the Former Spouses Protection Act, see, e.g., §1408(c)(1), and its legislative history [citation omitted], that Congress sought to change the legal landscape created by the *McCarty* decision. **Because pre-existing federal law, as construed by this court, completely pre-empted the application of state community property law to military retirement pay, Congress could overcome the *McCarty* decision only by enacting an affirmative grant of authority giving the States the power to treat military retirement pay as community property** [citation omitted]." (*Mansell v. Mansell* [App.F], p.6).

Nevertheless, on remand the California Court of Appeal relegated this Court's *ratio decidendi* and its holding to the status of mere *dicta*. California used sophistic subterfuge to circumvent this Court's jurisdiction and ordered community property divisions of the federal benefits. This Court's jurisdiction is thus invoked under 28 U.S.C. §1651(a) and *Dean v. Hickman*, 358 U.S. 57 (1958), and *Bucolo v. Adkins*, 424 U.S. 641 (1976), to remedy California's non-compliance with the Court's mandate.

The original California Opinion clearly rested on a finding of subject matter jurisdiction. After rejecting both of the ex-wife's arguments based on prior adjudication (App.D., pp. 6-8), and after finding that it was required to reach the merits of petitioner's claims (App.D., p.8), the California Court of Appeal said:

> "We are therefore compelled to conclude the court below had jurisdiction over Husband's retirement pay **and** his disability compensation prior to *McCarty* and, with the enactment of FUSFSPA, after the *McCarty* decision as well. (App.D, p.11).

This Court specifically reversed that very aspect of the case and held that the states do not have jurisdiction over V.A. disability benefits in divorce cases. This Court remanded the case for further proceedings **not inconsistent** with its Opinion in *Mansell v. Mansell*, (87-201). However, California continues to order precisely what this Court said the states do not have the power to do.

The California Court of Appeal now, for the first time, contends that the issue in the original appeal was

whether the trial court abused its discretion in denying the motion for modification (App. G, p.8). This misrepresents the entire nature of the case and is an obvious subterfuge to evade this Court's jurisdiction, to evade the federal question concerning federal pre-emption of subject matter jurisdiction by 38 U.S.C. §3101, and to arrive at an unconstitutional result.

The actual issues in the first appeal were all challenges to the trial court's power, in the fundamental subject-matter jurisdictional sense, to award the federal benefits as community property. Discretion had nothing to do with any of Major Mansell's arguments, had nothing to do with the ex-wife's opposition, and had nothing to do with the California Court of Appeal's original opinion (App. D).

It is rare indeed for a state court to flagrantly flaunt this Court's jurisdiction. Nevertheless, it is not unheard of. On rare occasions this Court has had to re-examine state-court interpretation of state law when it appears to be an "obvious subterfuge to evade consideration of a federal issue." (*Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120, 129, 65 S.Ct. 1475, 1480, 89 L.Ed. 2092 (1945); see also *Ward v. Love County*, 253 U.S. 17, 40 S.Ct. 419, 64 L.Ed.751 (1920); *Terre Haute & I. R. Co. v. Ketcham*, 194 U.S. 579, 24 S.Ct. 767, 48 L.Ed. 1124 (1904). The present case should be added to the list.

In the present case, both the trial court and the Court of Appeal refused to recognize the existence of the federal anti-attachment provisions of 38 U.S.C. §3101.

However, under the Supremacy Clause of the United States Constitution, Article VI, the state is required to acknowledge and enforce federal statutes (*Testa v. Katt*, 330 U.S. 386 (1947); *Miller v. Municipal Court*, 22 Cal.2d 818, 841, 851 (1943)).

In its second opinion the California Court of Appeal recognized that if the instant judgment was void for want of subject matter jurisdiction, then a proper basis for collaterally attacking the judgment is established.

> "As we have indicated *ante,* Husband contends the instant judgment was void for want of subject matter jurisdiction. This contention, if true, would be a proper basis for attacking the judgment.
>
> "* * * *
>
> "Husband is correct in his claim that the parties' stipulated property division could not confer subject matter jurisdiction on the supreior court. (See, e.g. *Summers v. Superior Court* (1959) 53 Cal.2d 295, 298). The question here, then, is whether the court had subject matter jurisdiction [over Major Mansell's V.A. disability benefits] in the first instance.
>
> "Husband's current argument against subject matter jurisdiction rests **in part** on language in the Supreme Court's *Mansell v. Mansell* opinion * * * *" (emphasis added, App.G, page 8).

What the Court of Appeal flagrantly ignors is that the **other part** of Major Mansell's jurisdictional challenge was founded on 38 U.S.C. §3101.

In its first Opinion the Court of Appeal failed to address the federal anti-attachment statute. In its second Opinion the court refused.

This is true, even after the omission was specifically called to the court's attention (Petition for Rehearing, page 3-9). Major Mansell argued that rehearing should be granted because:

> "[The Court] failed to address the question of absolute federal pre-emption under the anti-attachment provisions of the Veterans' Benefits Act, 38 U.S.C. §3101, which was raised and preserved at every stage of this case." (Petition for Rehearing, page 3-9).

Rehearing and Review were denied. Thus, it is unmistakable that California is evading the properly preserved federal question. This is not an oversight. The issue has been emphasized at every stage of the case.

It is also not merely a mistake of law. It is a conscious decision to flaunt federal jurisdiction. And, it is not new.

More than ten years ago the California Supreme Court "de-published" the case of *In re Marriage of Orr* [not officially published], 157 Cal.Rptr. 301 (1979), which properly addressed the precise question involved in the present case. The effect of the "de-publication" order is that the case may not be cited by any party to any California Court in any other action, and it cannot be relied on as precedent by any California Court (California Rule of Court 977). It is difficult to envision a clearer indication,

short of an open admission, that California has no intention of following federal law.

For these reasons petitioner asks this Court to issue a writ of mandamus to remedy California's sophistic attempt to circumvent this Court's jurisdiction, undermine public confidence in the judicial system, and render federal pre-emption a meaningless platitude in California.

REASON FOR ENTERING JUDGMENT

THIS COURT SHOULD ENTER JUDGMENT BECAUSE CALIFORNIA REFUSES TO DO SO

There can be no doubt that this Court held, in *Mansell v. Mansell*, (87-201), that the states do not have the power to divide, in divorce cases, military retirement pay that has been waived to receive veterans' disability benefits. However, the California Court of Appeal relegated this Court's analysis to the status of mere dicta, and reinstated its prior disposition of Major Mansell's disability compensation.

The California Court of Appeal then refused to address subject-matter jurisdictional pre-emption under 38 U.S.C. §3101. The state Supreme Court sanctioned this defiance by refusing to review the case. Thus, it is clear that California does not intend to defer to this Court.

In *Martin v. Hunter*, 1 Wheat 304, 4 L.Ed. 97 (1816), the Court said if a cause has once been remanded before and the state court declines or refuses to carry into effect the United States Supreme Court's mandate thereon, the

United States Supreme Court will proceed to a final decision of the case and award execution thereon. See also *Cook v. Porter*, 11 Wall 672, 20 L.Ed. 84 (1871), where the Court held that final process may issue from this Court when a state has refused to execute the mandate of the Court.

Since California will not concede that petitioner's Veterans Administration Disability Compensation is his separate property, this Court should enter final judgment declaring that the disability compensation is petitioner's separate property and declaring that petitioner's ex-wife is not entitled to community property division of the federal benefits.

REASONS FOR GRANTING A WRIT OF CERTIORARI

I
COMMUNITY PROPERTY DIVISION OF V.A. DISABILITY BENEFITS VIOLATES 38 U.S.C. §3101, WHICH POSITIVELY REQUIRES THAT DISABLED VETERANS ACTUALLY RECEIVE THE BENEFITS

When state action is in conflict with a direct pronouncement of federal law, the state act is invalid, even if the state moves in an area of its general competence. As the Court pointed out in *Ridgway v. Ridgway*, 454 U.S. 46 (1981):

> "Notwithstanding the limited application of federal law in the field of domestic relations generally, (see *McCarty v. McCarty*, 435 U.S. 210, 101 S.Ct. 2728, 2735, 69 L.Ed.2d 589 (1981); *Hisquierdo v.*

> *Hisquierdo*, 439 U.S. 572, 581 (1979); *In re Burrus*, 136 U.S. 586, 593-594 (1890)), this court, even in that area, has not hesitated to protect, under the Supremacy Clause, rights and expectancies established by federal law against the operation of state law, or to prevent the frustration and erosion of the congressional policy embodied in federal rights. **** And, specifically, **a state divorce decree, like other law governing the economic aspects of domestic relations, must give way to clearly conflicting federal enactments.**" (*emphasis added, Ridgway, supra*, 454 U.S. at 54-55).

Pre-emption by the federal government, quite simply, deprives state courts of subject matter jurisdiction (*McCulloch v. Maryland*, 4 Wheat 316 (1818)). If a state action is seen to be incompatible with any legitimate exercise of power by the federal government, it loses all claim of validity--and this is true even though the state action in question was taken within a sphere in which the states could otherwise act (*Free v. Bland*, 369 U.S. 663, 666 (1962)).

The Court has, on many previous occasions, considered direct conflicts between federal law and state community property laws, and each time resolved the conflict in favor of federal pre-emption (*McCune v. Essig*, 199 U.S. 382 (1905); *Wissner v. Wissner* 338 U.S. 655 (1950); *Free v. Bland*, 369 U.S. 633 (1962); *Hisquierdo v. Hisquierdo*, 439 U.S. 572 (1979); *McCarty v. McCarty*, 453 U.S. 210 (1981); *Mansell v. Mansell*, No. 87-210 (May 30, 1989)). In the present case there is an entire body of federal law protect-

ing veterans' benefits--Title 38, U.S.C. Thus, there is a clear and substantial federal interest which cannot be served if state community property law intercepts the benefits and awards them to a healthy former spouse.

In the present case, Major Mansell waived a portion of his military longevity retirement in order to receive disability compensation from the V.A. (38 U.S.C. §§310 and 3105). His monthly compensation is not based on any particular period of service, but rather is a flat sum determined on the basis of his percentage of disability and impairment of his earning capacity (38 U.S.C. §§314 and 355). As a recipient of V.A. disability benefits, Major Mansell is fully protected by the anti-attachment provisions of the Veterans' Benefits Act (38 U.S.C. §3101), which shield disability benefits from every form of legal process, except for child support (*Rose v. Rose*, 481 U.S. 619, 107 S.Ct. 2029, 95 L.Ed.2d 599 (1987).

Section 3101(a) states:

> (a) "Payment of benefits due or to become due under any law administered by the Veterans Administration shall not be assignable except to the extent specifically authorized by law, and such payments made to, or on account of, a beneficiary shall be exempt from taxation, shall be exempt from the claims of creditors, and **shall not be liable to attachment, levy, or seizure by or under any legal or equitable process whatever, either before or after receipt by the beneficiary**. ****".(*emphasis added.*)

Language identical to the phrase highlighted above, word for word, was involved in the case of *Wissner v.*

Wissner, 338 U.S. 655, 659 (1950), and again in the case of *Ridgway v. Ridgway*, 454 U.S. 46, 52-53 (1981). The *Wissner* Court held that the language prevented the state from applying community property law to reach the federal benefits. As a separate ground for reversal, the *Wissner* Court found that the diversion of future payments to be received by the beneficiary would be a "seizure" prohibited by the anti-attachment provision (*Wissner, supra.*, 338 U.S. at 659). The *Ridgway* Court, commenting on *Wissner*, said "*These are strong words and a positive ruling.*" (*Ridgway, supra*, 454 U.S. at 55).

> Venerable and worthy as this community [the business relationship of man and wife] is, it is not, we think, as likely to justify an exception to the congressional language as specific judicial recognition of particular needs, in the alimony and support cases." (*Wissner, supra*, 338 U.S. at 660).

Three years ago the Court had occasion to comment further on the distinction between support and community property claims. In *Rose v. Rose*, 481 U.S. 619, 107 S.Ct. 2029, 95 L.Ed.2d 599 (1987), the Court found an exception to Section 3101's prohibition against attachment, levy, or seizure in a *context of child support*. The Court found that the federal purpose would be furthered by allowing the disability benefits to provide support for the disabled veteran's children. The *Rose* court concluded:

> "Therefore, regardless of the merit of the distinction between the moral imperative of family support obligations and the *business-like justifications for community property division*, we conclude that

§3101(a) does not extend to protect a veteran's disability benefits from seizure where the veteran invokes that provision to avoid an otherwise valid order of child support." (emphasis added, *Rose, supra*, 481 U.S. 619).

The *Rose* Court also discussed the exception to anti-attachment statutes for alimony and child support in a context of *community property*.

> "Consistent with the distinction suggested in *Wissner v. Wissner*, 338 U.S. 655 (1950), Congress had amended the Social Security Act to authorize garnishment of certain federal benefits, including railroad retirement annuities, for spousal and child support **but not for community property divisions**. 42 U.S.C. §§659 and 662. We construed these amendments to 'expressly override' the anti-attachment provisions for support claims, finding it 'logical to conclude that Congress * * * thought that a family's need for support could justify garnishment, even though it deflected other federal benefit programs from their intended goals, but that **community property claims, which are not based on need, could not do so**.'" (emphasis added, *Rose, supra.*, 481 U.S. at n.6).

In the present case, there is no issue of child support or alimony. Thus, in keeping with the consistently uniform decisions of the Court, and consistent with the direct enactment of Congress, Major Mansell's disability benefits are protected by the anti-attachment provisions of 38 U.S.C. §3101.

Congress has positively required, by direct enactment, that the disabled veteran actually receive the disability benefits. The passage of the FUSFSPA did nothing to change the protections of the Veterans' Benefits Act (*Mansell v. Mansell*, No. 87-201 (May 30, 1989).

II
38 U.S.C. §3101 IS PART OF A GENERALIZED CONGRESSIONAL PLAN FOR PROTECTING VETERAN'S DISABILITY BENEFITS FROM ANY FORM OF ATTACHMENT EXCEPT FOR CHILD SUPPORT

Congress has charged the Veterans Administration with management of benefits for service-connected disabled veterans as its highest priority mission. (Senate Report No. 97-504 on the Omnibus Budget Reconciliation Act of 1982 (Pub.L.97-253), p.245). The Veterans' Benefits Act conforms to this generalized Congressional plan to protect veterans' disability benefits.

> "The basic purpose of the disability compensation program, throughout its history, has been one of providing relief from the impaired earning capacity of veterans disabled as the result of their military service. The amount of compensation payable varies according to the degree of disability which, in turn, is required by law to represent, to the extent practical, the average impairment in earning capacity resulting from such disability or combination of disabilities in civil occupations." (House Report No. 96-1155, p. 4, Veterans' Disability Compensation and Housing Benefits Amendments of 1980 (Public L. 96-385)).

In addition to providing at least some compensation for the injuries and disabilities that have been visited upon members in the service of their country, disability payments also benefit the nation as a whole. Disability payments help maintain a fit military force by encouraging those eligible for benefits to retire, rather than to conceal their disability and continue in active service for economic reasons. Protection of those disability benefits also helps preclude service members from concealing their impairments until they are transferred to a state that will not try to diminish the compensation by awarding part of it to a healthy former spouse. Like most of the other fringe benefits, they also facilitate recruitment. Furthermore, adequate disability benefits help avoid the possibility that disabled veterans will be a burden on local communities and other state and federal programs.

The thorough, thoughtful, and deliberate balance weighed by Congress (Senate Report No. 98-174,pp. 221-222 to accompany S-675, Department of Defense Authorization Act of 1984, (Pub. L. 98-94), 97 Stat. 614 (10 U.S.C. §§1461-1467) concerning payment of V.A. disability benefits is evinced by the singular treatment of retired military members. Other federal retirees who qualify for V.A. compensation are not required to waive a portion of their retirement pay to receive V.A. benefits.

Civil Service employees in the executive, legislative and judicial branches of government, certain foreign service retirees of the Department of State, and certain Central Intelligence Agency retirees can receive both full

retirement pay and full V.A. compensation (*Absher v. U.S.*, 9 Ct.Cl. 223, 224 (1985), aff'd, 805 F.2d 1025 (Fed.Cir., 1986), cert. den., 481 U.S. 1028, 107 S.Ct. 1953, 95 L.Ed.2d 526 (1987). Military retirees may not (38 U.S.C. §3105).

Further evidence of the overall Congressional intent to protect V.A. disability benefits can be found in other federal programs. The Social Security Act waives federal immunity from attachment of federal pay, including military pay, for child support and alimony (42 U.S.C. §659). However, community property is specifically excluded from the definition of alimony (42 U.S.C. §662[c]).

Congress allows garnishment of Civil Service retirement benefits for community property purposes (Pub.L. 95-366, 92 Stat. 600, 5 U.S.C. §8345(j)). And, Congress allows garnishment of Foreign Service retirement for community property division (22 U.S.C. §§4044 et seq.). However, Congress, presumably for good and sufficient reasons, has enacted no comparable provision for benefits payable by the Veterans Administration.

This contention finds added support in the provision of a separate benefit for a disabled veteran's dependent spouse (38 U.S.C. §315), a benefit which terminates on the last day of the calendar month in which an annulment or divorce occurs (38 U.S.C. §3012[b][2]).

Another significance of 38 U.S.C. §3101 in the present case, is that it speaks in clear terms concerning exemptions to the protection of the funds after receipt by the beneficiary. Section 3101 specifically states that the exemption from taxation does not extend to any property

purchased in part or wholly out of the disability payments. However, there is no such exemption from the anti-attachment provisions for the community property claims of former spouses.

Furthermore, subdivision b of §3101 specifically **prohibits collection, by offset or otherwise**, out of the benefits except for amounts due to the federal government by reason of overpayments or illegal payments. Nevertheless, California's reinstatement of community property division, without citing any specific statutory language, puts petitioner's ex-wife in a position even stronger than that of the federal government.

Congress is sensitive to the confidence placed in it by military personnel (Senate Report No. 98-174, pp. 221-222, *supra.*). Therefore, changes to the military retirement program must come as the product of thorough, thoughtful, and deliberate study that weighs heavily the impact of such changes on military force management and national security needs. When Congress intends to allow exemption from the anti-attachment policy, it specifically says so. Congress allows attachment of permanent investments for tax obligations (§3101(a)). Congress also allows offset to recover overpayments and unlawful payments (§3101(b). However, nothing in any statute or decision of the Court allows attachment or offset for collection of community property claims.

Until Congress chooses to act, its long-standing anti-attachment policy, as expressed in the Veterans' Benefits Act, FUSFSPA and the Social Security Act is con-

trolling. A program as carefully balanced as the V.A. disability compensation system should not be disrupted by the vagaries of the laws of the fifty states. Yet, California's reinstatement of community property division of petitioner's V.A. disability compensation does just that.

III
OFFSETTING GARNISHMENT OF OTHER ASSETS CONSTITUTES A SEIZURE OF THE V.A. DISABILITY BENEFITS FORBIDDEN BY 38 U.S.C. §3101

California may not make an offsetting award from other assets (*Wissner v. Wissner*, 338 U.S. 655, 659 (1951)). To do so would, in effect, anticipate the benefit in violation of the statute, just as would awarding a house or other property as an offset (*Hisquierdo v. Hisquierdo*, 439 U.S. 572, 588-589 (1979)), and as imposition of a constructive trust would operate as a forbidden "seizure." (*Ridgway v. Ridgway*, 454 U.S. 46, 60 (1981)). The state court's attempt to limit the anti-attachment provisions because of equitable interests violates the unqualified sweep of the statute. Section 3101 prohibits, in the broadest of terms, any "*attachment, levy, or seizure by or under any legal or equitable process whatever*," even after receipt by the disabled veteran (*Ridgway, supra.*, 454 U.S. at 60).

In *McCune v. Essig*, 199 U.S. 382 (1905), state homestead law created a beneficial interest in property that was originally under the control of the United States. The claimant argued that as soon as title passed out of the government it "instantly dropped back in time to the inception or initiation of the equitable right," and that the laws

of the state intercepted and prevented the federally designated beneficiary from obtaining complete title without first complying with state law.

This is exactly what California is doing in the present case. However, this Court held that the argument was just another way of imposing state limitations upon federally created rights. The Court held that, **since federal law placed the property in the hands of another, state law could not interfere** (*McCune, supra.*, 199 U.S. at 390).

In *Wissner v. Wissner*, 338 U.S. 655 (1950), the Court found it unnecessary to decide whether California is entitled to call Army pay community property (*Id.*, 338 U.S. at 657 n.2). Nevertheless, for two separate reasons, the Court held that the wife of a deceased Army officer had no community property interest in the proceeds of a National Service Life Insurance policy, the premiums of which were paid with community property.

The Court held that because the federal statute gave the service member the absolute right to designate the beneficiary, **the state may not interfere** with that designation by awarding the proceeds to another, or **by awarding an equivalent amount under some other theory** (336 U.S. at 659).

As an independent ground for reversing the California community property award of the benefits, the *Wissner* Court held that **the state judgment was in effect a seizure in violation of [former] 38 U.S.C. §816** (*Ibid.*). It is significant to note that the operative language of §816 is identical, word-for-word, to the operative language of §3101.

The *Wissner* court commented on the distinction between community property obligations and support obligations based upon particular needs in alimony and support cases. These comments eventually formed the basis of the holding of the Court in the recent case of *Rose v. Rose*, 481 U.S. 619, 107 S.Ct. 2029, 95 L.Ed.2d 599 (1987).

Concerning an offsetting award of other assets, the *Wissner* Court held:

> "Whether directed at the very money received from the government or an equivalent amount, the judgment below nullifies the soldier's choice and frustrates the deliberate purpose of Congress. It cannot stand." (338 U.S. at 659).

Almost thirty years later, the Court again addressed an offsetting award of other property to compensate for federal pre-emption of state community property laws. In *Hisquierdo v. Hisquierdo*, 439 U.S. 572 (1979), the Court held that **an offsetting award would defeat the purpose of the statute barring anticipation of payments** (*Id.*, at 588-590).

Like anti-attachment provisions generally, §3101 insures that the benefits are actually received by the beneficiary. It pre-empts all state law that stands in its way. It protects the benefits from legal process, notwithstanding any other law of any state. It prevents the vagaries of state law from disrupting the national scheme and guarantees a national uniformity that enhances the effectiveness of Congressional policy.

Therefore, certiorari should be granted to address the federal pre-emption issue that California refuses to address.

CONCLUSION

For these reasons, a Writ of Mandamus should issue, directed to the California Court of Appeal, Fifth Appellate District and the Honorable James Ardaiz, William Stone, and George Brown, Justices of the Court of Appeal, directing that judgment be entered declaring that petitioner's Veterans Administration disability compensation is his separate property; or

This Court should enter final judgment declaring that petitioner's Veterans Administration disability compensation is his separate property; or

A Writ of Certiorari should issue, directed to the California Court of Appeal, Fifth Appellate District, for consideration of whether petitioner's Veterans Administration disability compensation is protected from community property division upon dissolution of marriage by 38 U.S.C. §3101.

Respectfully Submitted,

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April, 1990

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FILED
May 29, 1979
Kenneth L. Randol
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Marion Harmon, Deputy

Attorney(s) for Petitioner

SUPERIOR COURT OF CALIFORNIA

COUNTY OF MERCED

In re the marriage of Petitioner: GAYE M. MANSELL and Respondent: GERALD E. MANSELL	No. 55594 INTERLOCUTORY JUDGMENT OF DISSOLUTION OF MARRIAGE

This proceedings was heard on May 29, 1979 before the Honorable George C. Barrett, Department Number Three. The court acquired jurisdiction of the respondent on June 15, 1977 by:

☒ Respondent on that date having appeared.

declaring that the parties are entitled to have their marriage dissolved. This interlocutory judgment does not constitute a final dissolution of marriage and the parties are still married and will be, and neither party may remarry, until a final judgment of dissolution is entered.

The court also orders that, unless both parties file their consent to a dismissal of this proceedings, a final judgment of dissolution be entered upon proper application of either party or on the court's own motion after the expiration of at least six months from the date the court acquired jurisdiction of the respondent. The final judgment shall include such other and further relief as may be necessary to a complete disposition of this proceeding, but entry of the final judgment shall not deprive this court of its jurisdiction over any matter expressly reserved to it in this or the final judgment until a final disposition is made of each such matter.

THE COURT ALSO ORDERS that:

1. All of the provisions of the Property Settlement Agreement executed by the parties on May 25, 1979, are ratified, confirmed and approved, and the agreement is attached hereto, made a part of, and incorporated into this judgment by reference, as if set forth verbatim, and each of the parties is ordered to comply with all of the terms and provisions of the agreement.

2. Respondent shall have the exclusive care, custody and control of the minor child of the parties, namely, BERNADETTE, born on October 27, 1964.

3. Petitioner shall have the right to visit the minor child at reasonable times and places upon the giving of reasonable notice to the Respondent.

4. Neither party shall pay the other any money or property as and for the support, care and maintenance of the minor child of the parties, but the issue of payment of such support is expressly reserved by the Court.

5. Petitioner shall receive no money or property from Respondent as and for spousal support as she has waived her right to receive such support.

6. Respondent shall make an allotment to Petitioner in an amount equalling fifty percent (50%) of the gross retirement pay and compensation from the Veterans' Administration accrued through Respondent's employment with the United States Air Force, and shall increase such allotment from time to time in an amount necessary to equal fifty percent (50%) of the gross amount of any and all increases in such retirement pay and compensation from the Veterans' Administration that may occur in the future until death of either party.

7. Jurisdiction over the distribution of Petitioner's share of the retirement pay and compensation from the Veterans' Administration accrued through Respondent's employment with the United States Air Force is expressly reserved by the Court.

8. Each party shall pay his own attorneys fees and costs in an amount agreed upon between each of them and his respective attorney.

9. A Final Judgment of Dissolution of Marriage may be entered forthwith upon the filing of appropriate documents by either party as each party has waived his rights to findings of fact and conclusions of law, to move for a new trial, and to appeal this judgment.

DATED: May 29, 1979

/s/ GEORGE C. BARRETT

JUDGE OF THE SUPERIOR COURT

Law Office of
T.N. PETERSEN
Shaffer Buildling
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Merced, California 95340
(209) 722-3826

FILED
August 10, 1983
Kenneth L. Randol
Merced County Clerk
Marion Harmon, Deputy

Attorney for Respondent

IN THE SUPERIOR COURT OF THE
STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF MERCED

GAYE M. MANSELL: Petitioner

and

GERALD E. MANSELL: Respondent

No. 55594

ORDER DENYING MOTION FOR MODIFICATION OF INTERLOCUTORY AND FINAL JUDGMENTS OF DISSOLUTION

This matter came on regularly for hearing on June 29, 1983 before the Honorable Robert M. Falasco, Judge of the Superior Court, on Respondent's Motion For Modification of Interlocutory and Final Judgments of Dissolution.

Petitioner was present in person and by her attorney Dennis Cornell and defendant was present in person and with his attorney T.N. Pettersen.

The Court having heard and considered the arguments of the attorneys for the parties; and good cause appearing therefore, IT IS HEREBY ORDERED that respondent's Motion For Reconsideration be, and the same is, hereby denied.

DATED: August 10, 1983

/s/ ROBERT M. FALASCO

HONORABLE ROBERT M. FALASCO
JUDGE OF THE SUPERIOR COURT

APPENDIX C

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FILED
August 10, 1983
Kenneth L. Randol
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Attorney for Respondent

IN THE SUPERIOR COURT OF THE
STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF MERCED

GAYE M. MANSELL: Petitioner and GERALD E. MANSELL: Respondent	No. 55594 ORDER DENYING MOTION FOR RECONSIDERATION

This matter came on regularly for hearing on August 1, 1983 on Respondent's Motion For Reconsideration of the matters previously heard herein on June 29, 1983 before the Honorable Robert M. Falasco, Judge of the Superior Court.

Petitioner appeared in person with her attorney Dennis Cornell and Respondent appeared in person with his attorney T.N. Petersen.

The Court having heard and considered the arguments of the attorneys for the parties; and good cause appearing therefore, IT IS HEREBY ORDERED that Respondent's Motion For Reconsideration be, and the same is, hereby denied.

DATED: August 10, 1983

/s/ ROBERT M. FALASCO

HONORABLE ROBERT M. FALASCO
JUDGE OF THE SUPERIOR COURT

FILED
January 30, 1987
Kevin A. Swanson, Clerk

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE
STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

In re the marriage of Gaye M. and Gerald E. Mansell

GAYE M. MANSELL

Plaintiff and Respondent

v.

GERALD E. MANSELL

Defendant and Appellant

5 Civil No. F002872

(Super. Ct. No. 55594)

O P I N I O N

WOOLPERT, Acting Justice

On May 25, 1979, Gerald Mansell and Gaye Mansell executed a property settlement agreement in conjunction with dissolution proceedings taking place at the same time. Although the parties

have been divorced since 1979, for purposes of convenience in this opinion, they will be referred to as Husband and Wife, respectively. On May 29, 1979, the Merced County Superior Court ordered entry of an interlocutory judgment of dissolution of marriage. The property settlement agreement was incorporated into the interlocutory judgment. Final judgment of dissolution was entered on June 4, 1979.

Present counsel for Husband was substituted in on May 13, 1983. Around this same time, Husband filed the motion for an order modifyng the interlocutory and final decrees. Wife opposed the motion, and the motion was later denied by the court. Husband's motion for reconsideration was also denied.

FACTS

The parties were married on July 24, 1954. There are six children by the marriage. The couple separated on May 15, 1977. As noted, a property settlement agreement was entered into in 1979 which was incorporated into the 1979 interlocutory judgment of dissolution of marriage. The record indicates Husband, a former serviceman eligible for air force retirement, filed a claim for disability with the Veterans Administration at least as early as July 13, 1977. Payments were to commence January 1, 1977, in the event Husband chose to waive a portion of his retirement pay and elected, instead, to receive Veterans Administration compensation for his disability. There is further evidence indicating he made such an election. The property settlement agreement stated all property listed on two schedules attached to the agreement was community property. Husband's retirement pay and Veterans Administration compensation was listed on these schedules and according to the schedules, each owned one-half interest in the pay and benefits.

The property settlement agreement contains the following provisions dealing with Husband's military retirement:

> "6. Respondent [Husband] shall make an allotment to Petitioner [Wife] in an amount equalling fifty percent (50%) of the gross retirement pay and compensation from the Veterans' Administration accrued through Respondent's employment with the United States Air Force, and shall increase such allotment from time to time in an amount

necessary to equal fifty percent (50%) of the gross amount of any and all increases in such retirement pay and compensation from the Veterans' Administrtion that may occur in the future until the death of either party."

Husband's motion to modify the interlocutory judgment, as well as his motion to reconsider denial of his motion to modify, dealt with the above provision. In each case, he sought to have the provision deleted from the interlocutory judgment.

INTRODUCTION

At the time the interlocutory judgment was entered in this case, California law was settled on the question of the character of military retirement and disability pay. On the question of retirement pay, our Supreme Court had stated:

> "The law is settled in California that retirement benefits which flow from the employment relationship, to the extent they have vested, are community property subject to equal division between the spouses in the event the marriage is dissolved. [Citations.] Underlying the community treatment of retirement benefits is the concept that they do not derive from the beneficence of the employer, but are properly part of the consideration earned by the employee. Thus whether an employee is required to make contributions to the retirement fund is irrelevant to the ultimate characterization of the benefits as community property. [Citations.] Furthermore, the principle that retirement benefits are community property has been held to apply whether the source of the retirement fund lies in a state, federal, military, or private employment relationship. [Citations.]" (*In re Marriage of Fithian* (1974) 10 Cal.3d 592, 596, fn. omitted)

In *Fithian,* the court also addressed the question of the character of military disability pay when an election, as in the present case, had been made to receive compensation in disability form rather than as retirement pay:

> "Under federal law a disabled serviceman may waive his retirement pay and instead receive a pension from the Veterans Administration. (38 U.S.C. §3105.) Because

some federal cases have referred to pension benefits as gratuities, Husband contends such benefits must be the separate property of the serviceman, and therefore retirement pay must be so characterized as well. While it would indeed be inconsistent with community property law to allow the Husband to transmute community property into his own separate property, pensions are not considered gratuities under California law and are classed as community property for precisely the same reasons that retirement benefits are community property. [Citations.] Thus, a disabled serviceman's option to receive a pension instead of retirement pay has no relevance to the issue whether the states may treat either type of benefit as community property." (*Id.* at p. 602, fn. omitted; see also *In re Marriage of Milhan* (1980) 27 Cal.3d 765.)

Approximately seven years after *Fithian,* the United States Supreme Court held in *McCarty v. McCarty* (1981) 453 U.S. 210, that state courts were impliedly preempted by the federal statutory scheme from dividing military *retirement* pay. (Id. at pp. 213, 231-236.)

The *McCarty* case began in the state courts of California where it was found the former Husband's retirement pay was community property. (*Id.* at pp. 217-219.) Nevertheless, the United States Supreme Court made two additional points in *McCarty* which are important to the present case.

First, the court stated:

"This Court repeatedly has recognized that '"[t]he whole subject of the domestic relations of husband and wife. . .belongs to the laws of the States and not to the laws of the United States."' [Citation.] Thus, '[s]tate family and family-property law must do "major damage" to "clear and substantial" federal interests before the Supremacy Clause will demand that state law be overridden.'"(*Id.* at p. 220.)

Second, the court stated:

"Congress may well decide, as it has in the Civil Service and Foreign Service contexts, that more protection should be afforded a former spouse of a retired service member.

This decision, however, is for Congress alone. We very recently have re-emphasized that in no area has the Court accorded Congress greater deference than in the conduct and control of military affairs. [Citation.] Thus, the conclusion that we reached in *Hisquierdo* follows *a fortiori* here: Congress has weighed the matter, and '[i]t is not the province of state courts to strike a balance different from the one Congress has struck.' [Citation.]" (*Id.* at pp. 235-236.)

Since *McCarty* was decided, Congress did exactly that: the "federal legislative scheme" which deals with the retirement pay and disability compensation involved in the present case (10 U.S.C. §1408 [FUSFSPA] has been drafted and amended. (See 10 West's Annot. U.S.C. (1983) §1408, p. 192; *id.* at pocket pt. p. 18.)

The most pertinent parts of section 1408 to the issues on appeal provide:

> "(4) 'Disposable retired or retainer pay' means the total monthly retired or retainer pay to which a member is entitled (other than the retired pay of a member retired for disability under chapter 61 of this title) less amounts which —
>
> "(A) are owed by that member to the United States;
>
> "(B) are required by law to be and are deducted from the retired or retainer pay of such member, including fines and forfeitures ordered by courts-martial, Federal employment taxes, and amounts waived in order to receive compensation under title 5 or title 38;
>
> "(C) are properly withheld for Federal, State, or local income tax purposes, if the withholding of such amounts is authorized or required by law and to the extent such amounts withheld are not greater than would be authorized if such member claimed all dependents to which he was entitled;
>
> "(D) are withheld under section 3402(i) of the Internal Revenue Code of 1954 (26 U.S.C. 3402(i)) if such member presents evidence of a tax obligation which supports such withholding;

(E) are deducted as Government life insurance premiums (not including amounts deducted for supplemental coverage); or

"(F) are deducted because of an election under Chapter 73 of this title to provide an annuity to a spouse or former spouse to whom payment of a portion of such member's retired or retainer pay is being made pursuant to a court order under this section." (10 U.S.C. §1408, subsec.(a)(4).)

"(c)(1) Subject to the limitations of this section, a court may treat disposable retired or retainer pay payable to a member for pay periods beginning after June 25, 1981, either as property solely of the member or as property of the member and his spouse in accordance with the law of the jurisdiction of such court." (10 U.S.C. §1408, subsec. (c)(1).)

The interlocutory judgment in the present action was filed before *McCarty*. The motion to modify was filed after *McCarty* and after enactment of FUSFSPA.

Only recently, and sometime after briefs were filed in the present case, our high court interpreted the impact of the FUSFSPA legislation and the *McCarty* decision on California community property law. (*Casas v. Thompson* (1986) 42 Cal.3d 131) The *Casas* opinion will be discussed with the issues on appeal to which it applies.

I. APPEAL TAKEN FROM ORDER DENYING MODIFICIATION OF A JUDGMENT?

Wife argues no appeal may be taken from an order denying modification of a judgment since the essence of such a result would be to allow Husband to appeal twice from the same judgment: The appeal should have been taken from the judgment or order itself. (Citing 4 Cal.Jur.3d, Appellate Review, §51, pp.88-89.)

However, viewed as a motion to vacate the original judgment and enter a different one, denial of the motion is appealable since appeal lies from the original judgment. (*Adams & Sevitich,* II Cal. Family L. Practice (7th ed. 1980) Setting Aside Family Law

judgments, S. 47; Code Civ. Proc, §904.1, subds. (a), (b)(i).) The postjudgment order also relates to enforcement of the judgment, inasmuch as the court specifically retained jurisdiction over the retirement and disability benefits, presumably to oversee enforcement and pay judgments (see *In re Marriage of Justice* (1984) 157 Cal.App.3d 82, 86, fn. 4.):

> "7. Jursidiction over the distribution of Petitioner's share of the retirement pay and compensation from the Veterans' Administration accrued through Respondent's employment with the United States Air Force is expressly reserved by the court."

Wife argues Husband has waived all rights to appeal because a stipulation contained in the original interlocutory judgment provided as follows:

> "9. A Final Judgment of Dissolution of Marriage may be entered forthwith upon the filing of appropriate documents by either party as each party has waived his rights to findings of fact and conclusions of law to move for a new trial, and to appeal this judgment."

In support of this argument, Wife cites *In re Marriage of Mahone* (1981) 123 Cal.App.3d 17, a case also involving air force retirement benefits. (*Id.* at p. 21.) Both parties appealed. The former Husband to the marriage challenged the finding his air force retirement was community property. A stipulation was entered into by the parties which stated the retirement pay was community property and the court found accordingly. Subsequent to entry of judgment, the *McCarty* decision was handed down by the United States Supreme Court; FUSFSPA had not yet been enacted.

Nevertheless, the *Mahone* court made the following observations regarding the stipulation:

> "Husband contends that federal legislation establishing the retirement scheme for the military preempts the application of a state's community property law to the retirement pay of military personnel. The United States Supreme Court recently held so. [Citations.]
>
> "It does not follow, however, that husband should be relieved of the trial stipulation by reason of the *McCarty* decision. The written stipulation was filed with the trial

California law that a federal military retirement pension was subject to division as community property, and the United States Supreme Court had not indicated to the contrary. [Citation.] The stipulation was in accordance with the law as it then stood, and husband is not entitled to relief from the stipulation merely because the law was subsequently changed by judicial decision. [Citations.]" (*Id.* at pp. 21-22.)

The parties in *Mahone* appealed from what the court quoted as being a "'Further Judgment on Reserved Issues After Bifurcation and Final Judgment of Dissolution of Marriage.'" (*Id.* at p. 21.) The present case is distinguishable from *Mahone.* Husband appeals, not from the original interlocutory judgment of dissolution, but from a later order denying modification of that judgment. The waiver entered into by the parties does not change the "appealable" character of the judgment, it only precludes the parties to the agreement from taking an appeal from the judgment itself. No restrictions involving appeals from subsequent judgments on motions to modify the judgment were stipulated to or agreed upon by the parties. This court must therefore reach the merits of the appeal in this case.

II. SUPERIOR COURT JURISDICTION

Husband argues the superior court did not have jurisdiction over the subject matter of the retirement pay or disability benefits. In support of this argument, Husband cites *In re Marriage of Costo* (1984) 156 Cal.App.3d. 781. In *Costo,* the court held that the state trial court had no jurisdiction over that portion of compensation pay the former serviceman received as a result of electing to waive retirement pay in order to receive disability benefits. (*Id.* at pp. 782, 786, discussing 10 U.S.C. §1408, subsec. (a)(4).)

Under the *Costo* reasoning, "disposable retired or retainer pay" over which state courts have jurisdiction is pay which first has deducted from it the amount received as disability compensation after a waiver election pursuant to title 38 of the United States Code. (*Id.* at p. 786.) Federal preemption therefore applies to the disability portion of the compensation. In so doing, the *Costo* court disagreed

In re Marriage of Stenquist (Stenquist II) (1983) 145 Cal.App.3d 430.)

The reasoning of *Costo* was criticized in *Casas*. (*Casas v. Thompson, supra,* 42 Cal.3d 131, 144-145.) The former serviceman in *Casas* adopted reasoning similar to that of the *Costo* court. (*Id.* at p. 144.) The Supreme Court first noted that the United States Supreme Court in *McCarty* had found state community property laws were impliedly preempted with regard to military pensions due to conflicts between state and federal law, and the general federal statutory scheme dealing with the area of military pensions. (*Id.* at p. 145.) Since the case before the state high court was both post *McCarty* and post-FUSFSPA, the issue was phrased as follows:

> "The *McCarty* holding of implied preemption is thus a contextual one, taking into account all relevant facts and circumstances. Those facts and circumstances have now changed by reason of Congress's enactment of FUSFSPA. Accordingly, the question we must address here is not whether FUSFSPA expressly grants to the states the power to divide the gross amount of military pensions, but whether under the present federal scheme there remains a conflict between the federal retirement statutes and California community property rights threatening clear and substantial federal interests with grave harm. Stated differently, were *McCarty* to be decided after FUSFSPA, would the Supreme Court imply preemption?" (*Ibid.*)

After a complete analysis of the issue, the court concluded:

> "Thus, each of *McCarty's* factual predicates for finding implied preemption disappeared when FUSFSPA was enacted." (*Id.* at p. 147.)

The court went on to the next step of its analysis:

> "Even if the present federal statutory scheme governing military retirement does not impliedly preempt, in a general sense, the application of California community property laws in total, it remains to be determined whether any specific provision of FUSFSPA expressly requires a limited change in pre-*McCarty* California practice." (*Id.* at p. 147.)

Like Husband, the former serviceman in *Casas* argued FUSFSPA, at minimum, expressly prohibited state courts from dividing that portion of the retirement pay the former service person elected to receive as disability compensation. Again, reliance was placed upon the earlier quoted language contained in 10 U.S.C. section 1408, subsections (a)(4) and (c)(1). (*Casas v. Thompson, supra,* 42 Cal.3d at pp. 147-148.) Subsection (c)(1), it was argued, limited divisability by state courts to disposable pay, which is defined as retirement pay remaining *after* the disability waiver election is taken out.

The court responded by reemphasizing the pre-*McCarty* position taken by the courts of this state:

> "A military pension is characterized as marital property to the extent acquired during the marriage because it is viewed as deferred compensation. (See *In re Marriage of Fithian, supra,* 10 Cal.3d 592, 596.) That compensation was earned by the community during the marriage and, once the pension vests, becomes the 'property' of the community in the generic sense. The concept of 'disposable' pay or income has nothing to do with the characterization of an asset." (*Casas, supra,* at p. 148.)

According to the state Supreme Court, the limitations in subsection (c)(1) refer to the amount of pay which may be attached or garnished. (*Id.* at pp. 148-156.)

The court concluded as follows:

> "In sum, considering its intent and operation, we find FUSFSPA is not consisitent with a division of gross, rather than disposable, military retired pay. FUSFSPA's intended limitations reach only restrictions on the garnishment of and direct payment from the retiree's disposable pay. Characterization of retirement pay remains a state law question. Thus, in California the military retiree's gross pay is a community asset subject to equal division." (*Id.* at p. 151, fn. omitted.)

We are therefore compelled to conclude the court below had jurisdiction over Husband's retirement pay *and* his disability compensation prior to *McCarty* and, with the enactment of FUSFSPA, after the *McCarty* decision as well. A similar conclusion

was reached in *In re Marriage of Daniels* (1986) 186 Cal.App.3d 1084, 1088, and *In re Marriage of Stephens* (1986) 184 Cal.App.3d 616. The *Daniels* court found no preemption under FUSFSPA of the state court's authority to treat a disability pension paid pursuant to title 38 elections as a community property asset.

Other courts have had no hesitancy in applying FUSFSPA retroactively. As one court noted, in addressing the question of retroactive application of *McCarty:*

> "[R]etroactivity is now a moot issue because *McCarty* is no longer the law. On February 1, 1983, the Uniformed Services Former Spouses' Protection Act (Pub.L. No. 97-252), an amendment to title 10 of the United States Code, became effective. The act overrules *McCarty,* stating a 'court may treat disposable retired or retainer pay payable to a member for pay periods beginnning after June 25, 1981, either as property solely of the member or as property of the member and his spouse in accordance with the law of the jurisdiction of such court.' (10 U.S.C. §1048(c)(1). California law treating military retirement pensions as community property is no longer preempted. The act's legislative history clearly indicates Congress' intent to abrogate all applications of the *McCarty* decision (see J. Explanatory Statement of the Com. of Conf. on Pub. L. No. 97-252 from House Conf. Rep. No. 97-749, Aug. 16, 1982, pp. 166-168, 128 Cong. Rec. (1982))." (*In re Marriage of Buikema* (1983) 139 Cal.App.3d 689, 691; accord, *Casas v. Thompson, supra,* 42 Cal.3d at pp. 140-141 & fn. 3; *In re Marriage of Daniels, supra,* 186 Cal.App.3d 1084; *In re Marriage of Frederick* (1983) 141 Cal.App.3d. 876, 880; *Aloy v. Mosh* (1985) 38 Cal.3d 413, 421-422.)

III. MUTUAL MISTAKE OF LAW

Husband argues the court should have allowed deletion of that portion of the property settlement agreement dealing with his retirement disability pay under the principles governing mutual mistake of law. In his declaration in support of the motion to modify, Husband stated he and respondent entered the agreement upon an erroneous mutual mistake of law shared by his counsel at the time.

The mistake involved the law surrounding distribution of Veterans Administration disability pensions and air force retirement benefits. As the *Casas* case demonstrates, the court was well within established principles of California community property law when if found these pensions and benefits to be a community property asset and thereby subject to equal division. No relevant mutual mistake of law has been shown.

IV. THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION

It is further alleged on appeal that retroactive application of FUSFSPA violates the Fifth and Fourteenth Amendments. Husband argues the retirement disability benefits are his separate property, and are being taken without just compensation. He also argues retroactive application of FUSFSPA results in the law being applied in an unreasonable, arbitrary and capricious manner.

To the extent these claims are based upon the theory that such pay or benefits are reduced pay for reduced current services, the arguments must fail. The essence of the argument is that the former serviceman performs the services currently (after divorce or separation), yet has his compensation for these services arbitrarily given to his former spouse after divorce, etc. In Casas, a similar argument was made and rejected. The court responded as follows:

> "On a similar note, Max also asserts that division of his military retirement pay is prohibited, because it is reduced compensation for reduced current services and, to the extent earned after his separation from Virginia, is not community property. However, in *In re Marriage of Fithian, supra,* 10 Cal.3d at page 604, we held 'military retirement pay must be realistically viewed as compensation for past, not present, services.' The Supreme Court in *McCarty* did not overrule *Fithian's* characterization of military retired pay as deferred compensation. See *McCarty v. McCarty, supra,* 453 U.S. at p. 223 [69 L.Ed.2d at p. 600].)" (*Casas v. Thompson, supra,* 42 Cal.3d at p. 142, fn. 5.).

Husband additionally argues under the Fifth Amendment prong of his attack that Congress somehow breached its promise to him and other servicemen by passing FUSFSPA; however, this

argument is unsupported by any fact or legal analysis in the record or the briefs.

Under his Fourteenth Amendment attack, Husband argues unequal treatment of similarly situated individuals occurs through retroactive application of FUSFSPA. He cites examples of individuals who are clearly *not* similarly situated. He is apparently concerned that application of the law of different states to individuals otherwise similarly situated (but for coming under the jurisdiction of a different state) will result in those individuals being treated differently. Yet this has always been the case in family law where property division takes place.

As noted earlier, the Supreme Court in *McCarty* emphasized the fact that such matters were traditionally the subject of state law. In *In re Marriage of Fairfull* (1984) 161 Cal.App.3d 532, 536, the court found no violation of due process, equal protection, or separation of powers due to retroactive application of FUSFSPA. The court also found the question of retroactive application to be clearly answered by the express intent of the Congress that the act be so applied. A similar result was reached in *In re Marriage of Ankenman* (1983) 142 Cal.App.3d 833, 838, in which the court found no due process violation through retroactive application.

V. FEDERAL JURISDICATION

Husband last argues Congress has violated article III of the United States Constitution by granting to state courts, pursuant to FUSFSPA, authority over entitlements which are exclusively within the jurisdiction of the federal judiciary pursuant to article III. The argument suggests that state courts have no jurisdiction to adjudicate federal statutory provisions. Further, Husband again relies upon the "current pay for current services" argument rejected by our state high court in *Casas*.

The article III argument must fail. It is not required that an article III judge preside over every case in which a charge, claim, or defense is based upon federal legislation. (*Palmore v. United States* (1973) 411 U.S. 389, 400.) Congress made clear its intent to allow division of military retirement pay and Veterans Administration benefits by state courts. (10 U.S.C. 1408, subsec. (c)(1); see also *In re Marriage of Sarles* (1983) 143 Cal.3d 24, 29-30.) The separation of powers argument was also rejected by the court in *Fairfull*.

The judgment is affirmed with appellate costs to respon

/s/ WOOLPERT

WOOLPERT Acting

WE CONCUR:

/s/ HAMLIN

HAMLIN J.

/s/ BALLANTYNE

BALLANTYNE J.

APPENDIX E:

Supreme Court
FILED
April 29, 1987
Laurence P. Gill, Clerk

ORDER DENYING REVIEW

AFTER JUDGMENT BY THE COURT OF APPEAL

5th District, No. F002872
S000361

IN THE SUPREME COURT OF THE
STATE OF CALIFORNIA

IN BANK

IN RE MARRIAGE OF MANSELL

MANSELL, Respondent,
v.
MANSELL, Appellant

Appellant's petition for review DENIED.

LUCAS
Chief Justice

SUPREME COURT OF THE UNITED STATES

No. 87-201

GERALD E. MANSELL, APPELLANT *v.*
GAYE M. MANSELL

ON APPEAL FROM THE COURT OF APPEAL OF CALIFORNIA
FIFTH APPELLATE DISTRICT

[May 30, 1989]

JUSTICE MARSHALL delivered the opinion of the Court.

In this appeal, we decide whether state courts, consistent with the federal Uniformed Services Former Spouses Protection Act, 10 U. S. C. § 1408 (1982 ed. and Supp. V) (Former Spouses Protection Act or Act), may treat, as property divisible upon divorce, military retirement pay waived by the retiree in order to receive veterans' disability benefits. We hold that they may not.

I

A

Members of the Armed Forces who serve for a specified period, generally at least 20 years, may retire with a pension. 10 U. S. C. § 3911 *et seq.* (Army) (1982 ed. and Supp. V); § 6321 *et seq.* (1982 ed. and Supp. V) (Navy and Marine Corps); § 8911 *et seq.* (1982 ed. and Supp. V) (Air Force). The amount of retirement pay a veteran is eligible to receive is calculated according to the number of years served and the rank achieved. §§ 3926 and 3991 (Army); §§ 6325–6326 (Navy and Marine Corps); § 8929 (Air Force). Veterans who became disabled as a result of military service are eligible for disability benefits. 38 U. S. C. § 310 (wartime disability); § 331 (peacetime disability). The amount of disability benefits a veteran is eligible to receive is calculated according to the seriousness of the disability and the degree to which th

veteran's ability to earn a living has been impaired. §§ 314 and 355.

In order to prevent double dipping, a military retiree may receive disability benefits only to the extent that he waives a corresponding amount of his military retirement pay. § 3105.[1] Because disability benefits are exempt from federal, state, and local taxation, § 3101(a), military retirees who waive their retirement pay in favor of disability benefits increase their after-tax income. Not surprisingly, waivers of retirement pay are common.

California, like several other States, treats property acquired during marriage as community property. When a couple divorces, a state court divides community property equally between the spouses while each spouse retains full ownership of any separate property. See Cal. Civ. Code Ann. § 4800(a) (West 1983 and Supp. 1989). California treats military retirement payments as community property to the extent they derive from military service performed during the marriage. See, *e. g.*, *Casas* v. *Thompson*, 42 Cal. 3d 131, 139, 720 P. 2d 921, 925, cert. denied, 479 U. S. 1012 (1986).

In *McCarty* v. *McCarty*, 453 U. S. 210 (1981), we held that the federal statutes then governing military retirement pay prevented state courts from treating military retirement pay as community property. We concluded that treating such pay as community property would do clear damage to important military personnel objectives. *Id.*, at 232–235. We reasoned that Congress intended that military retirement pay reach the veteran and no one else. *Id.*, at 228. In reaching this conclusion, we relied particularly on Congress' refusal to pass legislation that would have allowed former spouses to garnish military retirement pay to satisfy property settlements. *Id.*, at 228–232. Finally, noting the dis-

[1] For example, if a military retiree is eligible for $1500 a month in retirement pay and $500 a month in disability benefits, he must waive $500 of retirement pay before he can receive any disability benefits.

tressed plight of many former spouses of military members, we observed that Congress was free to change the statutory framework. *Id.*, at 235–236.

In direct response to *McCarty*, Congress enacted the Former Spouses Protection Act, which authorizes state courts to treat "disposable retired or retainer pay" as community property. 10 U. S. C. § 1408(c)(1).[2] "'Disposable retired or retainer pay'" is defined as "the total monthly retired or retainer pay to which a military member is entitled," minus certain deductions. § 1408(a)(4) (1982 ed., Supp. V). Among the amounts required to be deducted from total pay are any amounts waived in order to receive disability benefits. § 1408(a)(4)(B).[3]

The Act also creates a payments mechanism under which the Federal Government will make direct payments to a former spouse who presents, to the Secretary of the relevant military service, a state-court order granting her a portion of the military retiree's disposable retired or retainer pay. This direct payments mechanism is limited in two ways. § 1408(d). First, only a former spouse who was married to a military member "for a period of 10 years or more during which the member performed at least 10 years of service creditable in determining the member's eligibility for retired or retainer pay," § 1408(d)(2), is eligible to receive direct

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[2] The language of the Act covers both community property and equitable distribution States, as does our decision today. Because this case concerns a community property State, for the sake of simplicity we refer to § 1408(c)(1) as authorizing state courts to treat "disposable retired or retainer pay" as community property.

[3] Also deducted from total military retirement pay are amounts: (a) owed by the military member to the United States; (b) required by law to be deducted from total pay, including employment taxes, and fines and forfeitures ordered by courts-martial; (c) properly deducted from federal, state, and local income taxes; (d) withheld pursuant to other provisions under the Internal Revenue Code; (e) deducted to pay government life insurance premiums; and (f) deducted to create an annuity for the former spouse. 10 U. S. C. § 1408(a)(4)(A)–(F) (1982 ed. and Supp. V).

community property payments. Second, the Federal Government will not make community property payments that exceed 50 percent of disposable retired or retainer pay. § 1408(e)(1).

B

Appellant Gerald E. Mansell and appellee Gaye M. Mansell were married for 23 years and are the parents of six children. Their marriage ended in 1979 with a divorce decree from the Merced County, California, Superior Court. At that time, Major Mansell received both Air Force retirement pay and, pursuant to a waiver of a portion of that pay, disability benefits. Mrs. Mansell and Major Mansell entered into a property settlement which provided, in part, that Major Mansell would pay Mrs. Mansell 50 percent of his total military retirement pay, including that portion of retirement pay waived so that Major Mansell could receive disability benefits. Civ. No. 55594 (May 29, 1979). In 1983, Major Mansell asked the Superior Court to modify the divorce decree by removing the provision that required him to share his total retirement pay with Mrs. Mansell. The Superior Court denied Major Mansell's request without opinion.

Major Mansell appealed to the California Court of Appeal, Fifth Appellate District, arguing that both the Former Spouses Protection Act and the antiattachment clause that protects a veteran's receipt of disability benefits, 38 U. S. C. § 3101(a) (1982 ed. and Supp. IV),[4] precluded the Superior Court from treating military retirement pay that had been waived to receive disability benefits as community property. Relying on the decision of the Supreme Court of California in *Casas* v. *Thompson*, *supra*, the Court of Appeal rejected

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[4]That clause provides that veterans' benefits "shall not be assignable except to the extent specifically authorized by law, and . . . shall be exempt from the claim[s] of creditors, and shall not be liable to attachment, levy, or seizure by or under any legal or equitable process whatever, either before or after receipt by the [veteran]." 38 U. S. C. § 3101(a) (1982 ed. and Supp. IV).

that portion of Major Mansell's argument based on the Former Spouses Protection Act. 5 Civ. No. F002872 (Jan. 30, 1987).[5] *Casas* held that after the passage of the Former Spouses Protection Act, federal law no longer pre-empted state community property law as it applies to military retirement pay. The *Casas* court reasoned that the Act did not limit a state court's ability to treat total military retirement pay as community property and to enforce a former spouse's rights to such pay through remedies other than direct payments from the Federal Government. 42 Cal. 3d, at 143–151, 228 20 P. 2d, at 928–933. The Court of Appeal did not discuss the antiattachment clause, 38 U. S. C. §3101(a).[6] The Supreme Court of California denied Major Mansell's petition for review.

We noted probable jurisdiction, 487 U. S. —— (1988), and now reverse.

II

Because domestic relations are preeminently matters of state law, we have consistently recognized that Congress, when it passes general legislation, rarely intends to displace state authority in this area. See, *e. g.*, *Rose* v. *Rose*, 481 U. S. 619, —— (1987); *Hisquierdo* v. *Hisquierdo*, 439 U. S.

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[5] In a supplemental brief, Mrs. Mansell argues that the doctrine of res judicata should have prevented this pre-*McCarty* property settlement from being reopened. *McCarty* v. *McCarty*, 453 U. S. 210 (1981). The California Court of Appeal, however, decided that it was appropriate, under California law, to reopen the settlement and reach the federal question. 5 Civ. No. F002872 (Ct. App., Jan. 30, 1987). Whether the doctrine of res judicata, as applied in California, should have barred the reopening of pre-*McCarty* settlements is a matter of state law over which we have no jurisdiction. The federal question is therefore properly before us.

[6] Because we decide that the Former Spouses Protection Act precludes States from treating as community property retirement pay waived to receive veterans disability benefits, we need not decide whether the antiattachment clause, §3101(a), independently protects such pay. See, *e. g.*, *Rose* v. *Rose*, 481 U. S. 619 (1987); *Wissner* v. *Wissner*, 338 U. S. 655 (1950).

572, 581 (1979). Thus we have held that we will not find pre-emption absent evidence that it is "'positively required by direct enactment.'" *Hisquierdo*, *supra*, at 581 (quoting *Wetmore* v. *Markoe*, 196 U. S. 68, 77 (1904)). The instant case, however, presents one of those rare instances where Congress has directly and specifically legislated in the area of domestic relations.

It is clear from both the language of the Former Spouses Protection Act, see, *e. g.*, § 1408(c)(1), and its legislative history, see, *e. g.*, H. R. Conf. Rep. No. 97–749, p. 165 (1982); S. Rep. No. 97–502, pp. 1–3, 16 (1982), that Congress sought to change the legal landscape created by the *McCarty* decision.[7] Because pre-existing federal law, as construed by this Court, completely pre-empted the application of state community property law to military retirement pay, Congress could overcome the *McCarty* decision only by enacting an affirmative grant of authority giving the States the power to treat military retirement pay as community property. Cf. *Midlantic Nat. Bank* v. *New Jersey Dept. of Environmental Protection*, 474 U. S. 494, 501 (1986).

The appellant and appellee differ sharply on the scope of Congress' modification of *McCarty*. Mrs. Mansell views the Former Spouses Protection Act as a complete congressional rejection of *McCarty*'s holding that state law is pre-empted; she reads the Act as restoring to state courts all pre-*McCarty* authority. Major Mansell, supported by the Solicitor General, argues that the Former Spouses Protection Act is only a partial rejection of the *McCarty* rule that federal law pre-empts state law regarding military retirement pay.[8]

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[7] Congress also demonstrated its focus on *McCarty* when it chose June 25, 1981, the day before *McCarty* was decided, as the applicable date for some of the Act's provisions. 10 U. S. C. § 1408(c)(1); see also note following § 1408, Pub. L. 97–252, § 1006(b) (transition provisions).

[8] Although the Solicitor General has filed an *amicus* brief supporting Major Mansell, his initial *amicus* brief, filed before the Court noted jurisdiction, supported Mrs. Mansell.

Where, as here, the question is one of statutory construction, we begin with the language of the statute. See, *e. g.*, *Blum* v. *Stenson*, 465 U. S. 886, 896 (1984); *Consumer Product Safety Comm'n* v. *GTE Sylvania, Inc.*, 447 U. S. 102, 108 (1980). Mrs. Mansell's argument faces a formidable obstacle in the language of the Former Spouses Protection Act. Section 1408(c)(1) of the Act affirmatively grants state courts the power to divide military retirement pay, yet its language is both precise and limited. It provides that "a court may treat disposable retired or retainer pay . . . either as property solely of the member or as property of the member and his spouse in accordance with the law of the jurisdiction of such court." § 1408(c)(1). The Act's definitional section specifically defines the term "disposable retired or retainer pay" to exclude, *inter alia*, military retirement pay waived in order to receive veterans' disability payments. § 1408(a)(4)(B).[9] Thus, under the Act's plain and precise language, state courts have been granted the authority to treat disposable retired pay as community property; they have not been granted the authority to treat total retired pay as community property.

Mrs. Mansell attempts to overcome the limiting language contained in the definition, § 1408(a)(4)(B), by reading the Act as a garnishment statute designed solely to set out the circumstances under which, pursuant to a court order, the Federal Government will make direct payments to a former spouse. According to this view, § 1408(a)(4)(B) defines "[d]isposable retired or retainer pay" only because payments

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[9] The statute provides, in pertinent part:

"'Disposable retired or retainer pay' means the total monthly retired or retainer pay to which a member is entitled . . . less amounts which—

. . . . . .

"(B) are required by law to be and are deducted from the retired or retainer pay of such member, including fines and forfeitures ordered by courts-martials, Federal employment taxes, and amounts waived in order to receive compensation under title 5 or title 38 [disability payments]." § 1408(a)(4)(B).

under the federal direct payments mechanism are limited to amounts defined by that term.

The garnishment argument relies heavily on the Act's savings clause. That clause provides:

> "Nothing in this section shall be construed to relieve a member of liability for the payment of alimony, child support, *or other payments* required by a court order on the grounds that payments made out of disposable retired or retainer pay under this section have been made in the maximum amount permitted under [the direct payments mechanism]. Any such unsatisfied obligation of a member may be enforced by any means available under law other than the means provided under this section in any case in which the maximum amount permitted under . . . [the direct payments mechanism] has been paid." § 1408(e)(6) (emphasis added).

Mrs. Mansell argues that, because the savings clause expressly contemplates "other payments" in excess of those made under the direct payments mechanism, the Act does not "attempt to tell the state courts what they may or may not do with the underlying property." Brief for Appellee 17. For the reasons discussed below, we find a different interpretation more plausible. In our view, the savings clause serves the limited purpose of defeating any inference that the federal direct payments mechanism displaced the authority of state courts to divide and garnish property not covered by the mechanism. Compare *Hisquierdo*, 439 U. S., at 584 (to prohibit garnishment is to prohibit division of property); *Wissner* v. *Wissner*, 338 U. S. 655 (1950) (same).

First, the most serious flaw in the garnishment argument is that it completely ignores § 1408(c)(1). Mrs. Mansell provides no explanation for the fact that the defined term—"disposable retired or retainer pay"—is used in § 1408(c)(1) to limit specifically and plainly the extent to which state courts may treat military retirement pay as community property.

Second, the view that the Act is solely a garnishment statute and therefore not intended to pre-empt the authority of state courts is contradicted not only by § 1408(c)(1), but also by the other subsections of § 1408(c). Sections 1408(c)(2), (c)(3), and (c)(4) impose new substantive limits on state courts' power to divide military retirement pay. Section 1408(c)(2) prevents a former spouse from transferring, selling, or otherwise disposing of her community interest in the military retirement pay.[10] Section 1408(c)(3) provides that a state court cannot order a military member to retire so that the former spouse can immediately begin receiving her portion of military retirement pay.[11] And § 1408(c)(4) prevents spouses from forum shopping for a State with favorable divorce laws.[12] Because each of these provisions pre-empts state law, the argument that the Act has no pre-emptive effect of its own must fail.[13] Significantly, Congress placed

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[10] The Senate Report expressly contemplates that § 1408(c)(2) will pre-empt state law. S. Rep. No. 97–502, p. 16 (1982).

[11] There was some concern expressed at the Senate hearings on the Act that state courts could direct a military member to retire. See, *e. g.*, Hearings before the Subcommittee on Manpower and Personnel of the Senate Committee on Armed Services, 97th Cong., 2d Sess., 132–133 (1982) (Sen. Exon); *id.*, at 70–71 (veterans' group); *id.*, at 184 (Air Force). Thus the Senate version of the bill contained § 1408(c)(3) in order to ensure that state courts did not have such power, S. Rep. No. 97–502, at 17, and at conference the House agreed to add the provision. H. R. Conf. Rep. No. 97–746, p. 167 (1982).

[12] A state court may not treat disposable retirement pay as community property unless it has jurisdiction over the military member by reason of (1) residence, other than by military assignment in the territorial jurisdiction of the court, (2) domicile, or (3) consent. § 1408(c)(4). Although the Senate Committee had decided not to include any forum shopping restrictions, seeing "no need to limit the jurisdiction of the State courts by restricting the benefits afforded by this bill . . . ," S. Rep. No. 97–502, at 9, the House version of the bill contained the restrictions, and at conference, the Senate agreed to add them. H. R. Conf. Rep. No. 97–749, at 167.

[13] That Congress intended the substantive limits in § 1408(c)(1) to be, to some extent, distinct from the limits on the direct payments mecha-

each of these substantive restrictions on state courts in the same section of the Act as § 1408(c)(1). We think it unlikely that every subsection of § 1408(c), except § 1408(c)(1), was intended to pre-empt state law.

In the face of such plain and precise statutory language, Mrs. Mansell faces a daunting standard. She cannot prevail without clear evidence that reading the language literally would thwart the obvious purposes of the Act. See, *e. g.*, *Trans Alaska Pipeline Rate Cases*, 436 U. S. 631, 643 (1978). The legislative history does not indicate the reason for Congress' decision to shelter from community property law that portion of military retirement pay waived to receive veterans' disability payments.[14] But the absence of legislative his-

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nism contained in § 1408(d) is demonstrated by the legislative compromise that resulted in the direct payments mechanism being available only to former spouses who had been married to the military retiree for 10 years or more. § 1408(d)(2). Under the House version of the bill, military retirement pay could be treated as community property only if the couple had been married for 10 years or more. H. R. Conf. Rep. No. 97-749, at 165. The Senate Committee had considered, but rejected, such a provision. S. Rep. No. 97-502, at 9-11. The conferees agreed to remove the House restriction. Instead, they limited the federal direct payments mechanism to marriages that had lasted 10 years or more. H. R. Conf. Rep. No. 97-749, at 166-167. Under this compromise, state courts have been granted the authority to award a portion of disposable military retired pay to former spouses who were married to the military member for less than 10 years but such former spouses may not take advantage of the direct payments mechanism.

[14] The only reference to the definitional section is contained in the Senate Report which states that the deductions from total retired pay, including retirement pay waived in favor of veterans' disability payments, "generally parallel those existing deductions which may be made from the pay of Federal employees and military personnel before such pay is subject to garnishment for alimony or child support payments under section 469 of the Social Security Act. (42 U. S. C. 659)." S. Rep. No. 97-502, at 14. This statement, however, describes the defined term in § 1408(a)(4). It is not helpful in determining why Congress chose to use the defined term—"disposable retired or retainer pay"—to limit state-court authority in § 1408(c)(1).

tory on this decision is immaterial in light of the plain
precise language of the statute; Congress is not required
build a record in the legislative history to defend its po
choices.

Because of the absence of evidence of specific intent in
legislative history, Mrs. Mansell resorts to arguments ab
the broad purposes of the Act. But this reliance is mispla
because, at this general level, there are statements that b
contradict and support her arguments. Her argument t
the Act contemplates no federal pre-emption is supported
statements in the Senate Report and the House Confere
Report that the purpose of the Act is to overcome
McCarty decision and to restore power to the States.[15]
the Senate Report and the House Conference Report
contain statements indicating that Congress rejected the
complicated option of removing all federal pre-emption
returning unlimited authority to the States.[16] Indeed, a
that would have eliminated all federal pre-emption died in
Senate Committee.[17] Her argument that Congress prima

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[15] See, *e. g.*, S. Rep. No. 97–502, at 1 ("The primary purpose of the
is to remove the effect of the United States Supreme Court decisio
McCarty v. *McCarty*, 453 U. S. 210 (1981). The bill would accomplish
objective by permitting Federal, State, and certain other courts, con
ent with the appropriate laws, to once again consider military retired
when fixing the property rights between the parties to a divorce, diss
tion, annulment or legal separation"). See also *id.*, at 5; *id.*, at 16; H
Conf. Rep. No. 97–749, at 165.

[16] H. R. Conf. Rep. No. 97–749, at 165 ("The House amendment w
permit disposable military retired pay to be considered as property i
vorce settlements *under certain specified conditions*") (emphasis add
ibid. ("The House Amendment contained several provisions that w
place restrictions on the division of retired pay"); S. Rep. No. 97–502,
("[Senate] 1814 imposes *three distinct limits* on the division or enforcer
of court orders against military retired pay in divorce cases") (emph
added).

[17] Entitled "Nonpreemption of State law" the bill provided that "[
purposes of division of marital property of any member or former mem
of the armed forces upon dissolution of such member's marriage, the la

intended to protect former spouses is supported by evidence that Members of Congress were moved by and responding to the distressed economic plight of military wives after a divorce.[18] But the Senate Report and the House debates contain statements which reveal that Congress was concerned as well with protecting the interests of military members.[19]

Thus, the legislative history, read as a whole, indicates that Congress intended both to create new benefits for former spouses and to place limits on state courts designed to protect military retirees. Our task is to interpret the statute as best we can, not to second guess the wisdom of the congressional policy choice. See, *e. g.*, *Rodriguez* v. *United States*, 480 U. S. 522, 526 (1987) *(per curiam)* ("[d]eciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice"). Given Congress' mixed purposes, the legislative history does not clearly support Mrs. Mansell's

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the State in which the dissolution of marriage proceeding was instituted shall be dispositive on all matters pertaining to the division of any retired, retirement, or retainer pay to which such member or former member is entitled or will become entitled." S. 1453, 97th Cong., 1st Sess. (1981).

[18] The Senate Committee pointed out that "frequent change-of-station moves and the special pressures placed on the military spouse as a homemaker make it extremely difficult to pursue a career affording economic security, job skills and pension protection." S. Rep. No. 97–502, at 6. The language of the Act, and much of its legislative history, is written in gender neutral terms and there is no doubt that the Act applies equally to both former husbands and former wives. But "it is quite evident from the legislative history that Congress acted largely in response to the plight of the military *wife*." Horkovich, Uniformed Services Former Spouses' Protection Act: Congress' Answer to *McCarty* v. *McCarty* Goes Beyond the Fundamental Question, 23 Air Force L. Rev. 287, 308 (1982–1983) (emphasis in original).

[19] See, *e. g.*, S. Rep. No. 97–502, at 7 ("All agreed that some form of remedial legislation which is fair and equitable to both spouses was necessary to provide a solution to the *McCarty* decision."); see also *id.*, at 11; nn. 10, 11, 12, and 16, *supra*.

view that giving effect to the plain and precise language of the statute would thwart the obvious purposes of the Act.

We realize that reading the statute literally may inflict economic harm on many former spouses. But we decline to misread the statute in order to reach a sympathetic result when such a reading requires us to do violence to the plain language of the statute and to ignore much of the legislative history. Congress chose the language that requires us to decide as we do, and Congress is free to change it.

III

For the reasons stated above, we hold that the Former Spouses Protection Act does not grant state courts the power to treat, as property divisible upon divorce, military retirement pay that has been waived to receive veterans disability benefits. The judgment of the California Court of Appeal is hereby reversed and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

the Former Spouses Protection Act. Today, despite overwhelming evidence that Congress intended to overrule *McCarty* completely, to alter pre-existing federal military pension law so as to eliminate the pre-emptive effect discovered in *McCarty*, and to restore to the States authority to issue divorce decrees affecting military pensions consistent with state law, the Court assumes that Congress only partially rejected *McCarty* and that the States can apply their community property laws to military pensions only to the extent that the Former Spouses Protection Act affirmatively grants them authority to do so. *Ante*, at 6. The *McCarty* decision, however, did not address retirement pay waived to receive disability benefits; nor did it identify any explicit statutory provision precluding the States from characterizing such waived retirement pay as community property. Thus, I reject the Court's central premise that the States are precluded by *McCarty* from characterizing as community property any retirement pay waived to receive disability benefits absent an affirmative grant of authority in the Former Spouses Protection Act.

In my view, Congress intended, by enacting the Former Spouses Protection Act, to eliminate the effect of *McCarty*'s pre-emption holding altogether and to return to the States their authority "to treat military pensions in the same manner as they treat other retirement benefits." S. Rep. No. 97–502, p. 10 (1982). See also *id.*, at 1 ("The primary purpose of the bill is to remove the effect of the United States Supreme Court decision in *McCarty* v. *McCarty*, 453 U. S. 210 (1981). The bill would accomplish this objective by permitting Federal, State, and certain other courts, consistent with the appropriate laws, to once again consider military retired pay when fixing the property rights between the parties to a divorce, dissolution, annulment or legal separation"); *id.*, at 5 ("[T]he committee intends the legislation to restore the law to what it was when the courts were permitted to apply State divorce laws to military retired pay"); *id.*, at 16

("The provision is intended to remove the federal pre-emption found to exist by the United States Supreme Court and permit State and other courts of competent jurisdiction to apply pertinent State or other laws in determining whether military retired or retainer pay should be divis-[i]ble"); 128 Cong. Rec. 18314 (1982) ("The amendment simply returns to State courts the authority to treat military retired pay as it does other public and private pensions.") (remarks of Rep. Schroeder, bill sponsor).

Family law is an area traditionally of state concern, *Hisquierdo* v. *Hisquierdo*, 439 U. S. 572, 581 (1979), and we have not found federal pre-emption of state authority in this area absent a determination that "Congress has 'positively required by direct enactment' that state law be pre-empted." *Ibid.* (quoting *Wetmore* v. *Markoe*, 196 U. S. 68, 77 (1904)). The Former Spouses Protection Act does not "positively require" States to abandon their own law concerning the divisibility upon divorce of military retirement pay waived in order to obtain veterans' disability benefits. On the contrary, the whole thrust of the Act was to restore to the States their traditional authority in the area of domestic relations. Even beyond that restoration, Congress sought to provide greater federal assistance and protection to military spouses than existed before *McCarty* by creating a federal garnishment remedy in aid of state court community property awards. That, in fact, is the central purpose and preoccupation of the Act's complex statutory framework. The Former Spouses Protection Act is primarily a remedial statute creating a mechanism whereby former spouses armed with state court orders may enlist the Federal Government to assist them in obtaining some of their property entitlements upon divorce. The federal garnishment remedy created by the Act is limited, but it serves as assistance and not, as the Court would have it, hindrance to former spouses. Thus, the provision at 10 U. S. C. § 1408(a)(4)(B) (1982 ed. and Supp. V) of the Act defining "[d]isposable retired or retainer pay" to exclude

"amounts waived in order to receive compensation under title 5 or title 38," and its incorporation into § 1408(c)(1)'s community property provision, only limits the federal garnishment remedy created by the Act. It does not limit the authority of States to characterize such waived retirement pay as community property under state law.

This reading is reinforced by the legislative history, which indicates that "[t]he specific deductions that are to be made from the total monthly retired and retainer pay generally parallel those existing deductions which may be made from the pay of Federal employees and military personnel before such pay is subject to *garnishment* for alimony or child support payments under section 459 of the Social Security Act (42 U. S. C. 659)." S. Rep. No. 97–502, at 14 (emphasis added). The Court finds that this statement "is not helpful in determining why Congress chose to use the defined term—'disposable retired or retainer pay'—to limit state-court authority in § 1408(c)(1)." *Ante*, at 10, n. 14. True, it is singularly unhelpful in supporting the Court's view that § 1408(c)(1) denies state courts authority to *characterize* retirement pay waived in lieu of disability benefits as community property. By contrast, it *is* helpful in determining why Congress chose to use "disposable retired or retainer pay" as the term limiting state-court authority to *garnish* military retirement pay. In light of the fact that disability benefits are exempt from garnishment in most cases, 38 U. S. C. § 3101(a) (1982 ed., Supp. V), had Congress not excluded "amounts waived" in order to receive veterans' disability benefits from the federal garnishment remedy created by the Former Spouses Protection Act it would have eviscerated the force of the anti-attachment provisions of § 3101(a).

To take advantage of the federal garnishment remedy, which provides for direct payment by the Government to former spouses in specified circumstances, former spouses must serve on the appropriate service Secretary court orders meeting certain requirements. In the case of a division of

property, the court order must "specifically provid[e] for the payment of an amount, expressed in dollars or as a percentage of disposable retired or retainer pay, from the disposable retired or retainer pay of a member." 10 U. S. C. § 1408(a)(2)(C) (1982 ed., Supp. V). It must contain certain information and be regular on its face. §§ 1408(b)(1)(B), 1408(b)(1)(C), 1408(b)(1)(D), 1408(b)(2) (1982 ed. and Supp. V). The Act sets forth the procedures to be followed by the Secretary in making payments directly to former spouses. § 1408(d) (1982 ed. and Supp. V). Finally, the Act places limits on the total amount of disposable retirement pay that may be paid by the Secretary to former spouses, §§ 1408(e)(1), 1408(e)(4)(B) (1982 ed. and Supp. V), and it clarifies the procedures to be followed in the event of multiple or conflicting court orders. §§ 1408(e)(2), 1408(e)(3)(A) (1982 ed., Supp. V).

Subsection 1408(c)(1) authorizes the application of this federal garnishment remedy to community property awards by providing that "a court *may* treat disposable retired or retainer pay payable to a member . . . either as property solely of the member or as property of the member and his spouse in accordance with the law of the jurisdiction of such court" (emphasis added). This provision should not be read to *preclude* States from characterizing retirement pay waived to receive disability benefits as community property but only to preclude the use of the federal direct payments mechanism to attach that waived pay. Nor do §§ 1408 (c)(2), (c)(3), and (c)(4) compel the conclusion that Congress intended to preempt States from characterizing gross military retirement pay as community property divisible upon divorce. Those three provisions indicate what States may "not" do. That Congress explicitly restricted the authority of courts in certain specific respects, however, does not support the inference that § 1408(c)(1)—an affirmative *grant* of power—should be interpreted as precluding everything it does not grant. On the contrary, it supports the inference that Congress explicitly and directly precluded those matters it wished to pre-

empt entirely, leaving the balance of responsibility in the area of domestic relations to the States. In this respect, the Court mischaracterizes Gaye Mansell's argument as insisting that "the Act contemplates no federal pre-emption. . . ." *Ante*, at 11. Subsection 1408(c) has substantive effects on the power of state courts—its first paragraph expands those powers ("a court may treat"); its remaining paragraphs restrict those powers ("this section does not create"; "[t]his section does not authorize"; "[a] court may not treat").

That States remain free to characterize waived portions of retirement pay as community property is unambiguously underscored by the broad language of the savings clause contained in the Act, § 1408(e)(6). That clause provides:

> "*Nothing* in this section shall be construed to relieve a member of liability for the payment of alimony, child support, *or other payments* required by a court order on the grounds that payments made out of disposable retired or retainer pay under this section have been made in the maximum amount permitted under paragraph (1) or subparagraph (B) of paragraph (4). *Any such unsatisfied obligation of a member may be enforced by any means available under law other than the means provided under this section* in any case in which the maximum amount permitted under paragraph (1) has been paid and under section 459 of the Social Security Act (42 U. S. C. 659) in any case in which the maximum amount permitted under subparagraph (B) of paragraph (4) has been paid" (emphasis added).

The Court explains that the savings clause "serves the limited purpose of defeating any inference that the federal direct payments mechanism displaced the authority of state courts to divide and garnish property *not* covered by the mechanism." *Ante*, at 8 (emphasis added). I agree. What I do not understand is how the Court can read the Act's savings clause in this manner and yet conclude, without contradiction, that California may not characterize retirement pay

waived for disability benefits as community property. All California seeks to do is "divide and garnish property not covered by the [federal direct payments] mechanism." *Ibid.* Specifically, California wishes to exercise its traditional family law powers to divide as community property that portion of Major Mansell's retirement pay which he unilaterally converted into disability benefits, and use state-law garnishment remedies to attach the *value* of Gaye Mansell's portion of this community property. That is precisely what § 1408(e)(6) saves to the States by "defeating" any contrary inference, *ante*, at 8, that the Act has displaced the State's authority to enforce its divorce decrees "by any means available under law other than the means provided under this section. . . ." § 1408(e)(6). As the California Supreme Court so aptly put it, in the savings clause Congress emphasized that "the limitations on the service secretary's ability to reach the retiree's gross pay [are] not to be deemed a limitation on the state court's ability to define the community property interests at the time of dissolution." *Casas* v. *Thompson*, 42 Cal. 3d 131, 150, 720 P. 2d 921, 933, cert. denied, 479 U. S. 1012 (1986). In other words, while a former spouse may not receive community property payments that exceed 50 percent of a retiree's disposable retirement pay through the direct federal garnishment mechanism, § 1408(e)(1), a state court is free to characterize gross retirement pay as community property depending on the law of its jurisdiction, and former spouses may pursue any other remedy "available under law" to satisfy that interest. "Nothing" in the Former Spouses Protection Act relieves military retirees of liability under such law if they possess other assets equal to the value of the former spouse's share of the gross retirement pay.

Under the Court's reading of the Act as precluding the States from characterizing gross retirement pay as community property, a military retiree has the power unilaterally to convert community property into separate property and increase his after-tax income, at the expense of his ex-spouse's

financial security and property entitlements. To read the statute as permitting a military retiree to pocket 30 percent, 50 percent, even 80 percent of gross retirement pay by converting it into disability benefits and thereby to avoid his obligations under state community property law, however, is to distort beyond recognition and to thwart the main purpose of the statute, which is to recognize the sacrifices made by military spouses and to protect their economic security in the face of a divorce. Women generally suffer a decline in their standard of living following a divorce. See Weitzman, The Economics of Divorce: Social and Economic Consequences of Property, Alimony and Child Support Awards, 28 UCLA L. Rev. 1181, 1251 (1981). Military wives face special difficulties because "frequent change-of-station moves and the special pressures placed on the military spouse as a homemaker make it extremely difficult to pursue a career affording economic security, job skills and pension protection." S. Rep. No. 97–502, at 6. The average military couple married for 20 years moves about 12 times, and military wives experience an unemployment rate more than double that of their civilian counterparts. Brief for Women's Equity Action League et al. as *Amicus Curiae* 10–11. Pensions, moreover, are often the single most valuable asset acquired by military couples. *Id.*, at 18. Indeed, the one clear theme that emerges from the legislative history of the Act is that Congress recognized the dire plight of many military wives after divorce and sought to protect their access to their ex-husbands' military pensions. See S. Rep. No. 97–502, at 6; 128 Cong. Rec. 18318 (1982) ("[F]requent military moves often preclude spouses from pursuing their own careers and establishing economic independence. As a result, military spouses are frequently unable to vest in their own retirement plans or obtain health insurance coverage from a private employer. Military spouses who become divorced often lose all access to retirement and health benefits—despite a 'career' devoted to the military") (remarks of Rep. Schumer). See

also *id.*, at 18315, 18316, 18317, 18320, 18323, 18328. Reading the Act as not precluding States from characterizing retirement pay waived to receive disability benefits as property divisible upon divorce is faithful to the clear remedial purposes of the statute in a way that the Court's interpretation is not.

The conclusion that States may treat gross military retirement pay as property divisible upon divorce is not inconsistent with 38 U. S. C. §3101(a) (1982 ed., Supp. V). This anti-attachment provision provides that veterans' disability benefits "shall not be liable to attachment, levy, or seizure by or under any legal or equitable process whatever, either before or after receipt by the beneficiary." Gaye Mansell acknowledges, as she must, that §3101(a) precludes her from garnishing under state law Major Mansell's veterans' disability benefits in satisfaction of her claim to a share of his gross military retirement pay, just as §1408(c)(1) precludes her from invoking the federal direct payments mechanism in satisfaction of that claim. To recognize that §3101(a) protects the funds from a specific source, however, does not mean that §3101(a) prevents Gaye Mansell from recovering her 50 percent interest in Major Mansell's gross retirement pay out of any income or assets he may have *other* than his veterans' disability benefits. So long as those benefits themselves are protected, calculation of Gaye Mansell's entitlement on the basis of Major Mansell's gross retirement pay does not constitute an "attachment" of his veterans' disability benefits. Section 3101(a) is designed to ensure that the needs of disabled veterans and their families are met, see *Rose* v. *Rose*, 481 U. S. 619, 634 (1987), without interference from creditors. That purpose is fulfilled so long as the benefits themselves are protected by the anti-attachment provision.

In sum, under the Court's interpretation of the Former Spouses Protection Act, the former spouses Congress sought to protect risk having their economic security severely undermined by a unilateral decision of their ex-spouse to waive

retirement pay in lieu of disability benefits. It is inconceivable that Congress intended the broad remedial purposes of the statute to be thwarted in such a way. To be sure, as the Court notes, Congress sought to be "fair and equitable" to retired service members as well as to protect divorced spouses. *Ante*, at 12, and n. 19. Congress explicitly protected military members by limiting the percentage of disposable retirement pay subject to the federal garnishment remedy and by expressly providing that military members could not be forced to retire. See 10 U. S. C. §§ 1408(e)(1), 1408(e)(4)(B), 1408(c)(3). Moreover, a retiree is still advantaged by waiving retirement pay in lieu of disability benefits: the pay which is waived is not subject to the federal direct payments mechanism, and the former spouse must resort instead to the more cumbersome and costly process of seeking a state garnishment order against the value of that waived pay. See H. R. Rep. No. 98–700, pp. 4–5 (1984) (discussing difficulties faced by ex-spouses in obtaining state garnishment orders). Even these state processes cannot directly attach the military retiree's disability benefits for purposes of satisfying a community property division given the strictures of the anti-attachment provision of 38 U. S. C. §3101(a). There is no basis for concluding, however, that Congress sought to protect the interests of service members by allowing them unilaterally to deny their former spouses *any* opportunity to obtain a fair share of the couple's military pension.

It is now once again up to Congress to address the inequity created by the Court in situations such as this one. But because I believe that Congress has already expressed its intention that the States have the authority to characterize waived retirement pay as property divisible upon divorce, I dissent.

Appendix G

Court of Appeal
Fifth Appellate District
FILED
Dec 18 1989
Kevin A. Swanson, Clerk

CERTIFIED FOR PUBLICATION**

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT

In re the Marriage of GAYE M. and GERALD E. MANSELL	)	F002872
	)	(Super. Ct. No. 55594)
GAYE M. MANSELL, Plaintiff and Respondent, v. GERALD E. MANSELL, Defendant and Appellant.	)	OPINION

APPEAL from a judgment of the Superior Court of Merced County. Robert M. Falasco, Judge.

John Bucan, T.N. Petersen and Douglas B. Cone for Defendant and Appellant.

Allen, Cornell & Mason, Allen, Ivey, Cornell & Mason, Allen, Cornell, Polgar & Proietti and Dennis A. Cornell and Tracey Felton for Plaintiff and Respondent.

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The parties (hereinafter referred to as Husband and Wife) were married on July 24, 1954, and separated on May 15, 1977. At approximately the time of the separation, Husband, a former serviceman eligible for Air Force retirement, filed a disability claim with the Veterans Administration, and elected to waive a portion of his retire-

** See letter following opinion.

ment pay to receive Veterans Administration compensation for his disability. (38 U.S.C.A. §§3104, 3105.)

On May 25, 1979, Husband and Wife entered into a stipulated property settlement agreement. Among the terms of said agreement was that Wife was to receive "1/2 interest in retirement pay and compensation from the Veterans' Administration accrued through Husband's employment with the United States Air Force." On May 29, 1979, an interlocutory decree of dissolution was entered, incorporating the aforementioned property settlement. Paragraph six of the interlocutory decree provides:

> "Respondent [Husband] shall make an allotment to Petitioner [Wife] in an amount equalling fifty percent (50%) of the gross retirement pay and compensation from the Veterans' Administration accrued through Respondent's employment with the United States Air Force, and shall increase such allotment from time to time in an amount necessary to equal fifty percent (50%) of the gross amount of any and all increases in such retirement pay and compensation from the Veterans' Administration that may occur in the future until the death of either party."

The interlocutory judgment was incorporated, in all material respects, into a final decree of dissolution entered June 4, 1979.

Nearly four years later, on or about May 13, 1983, Husband moved for an order modifying the interlocutory and final decrees. Specifically, he sought to strike from those decrees the aforementioned paragraph six. The basis for the proposed modification was the United States Supreme Court's decision in McCarty v. McCarty (1981) 453 U.S. 210, and the Congressional response to the McCarty decision, the Federal Uniformed Services Former Spouses Protection Act, 10 United States Code section 1408 (FUSFSPA). Husband noted the McCarty decision precluded characterization of military retirement benefits as community property, and that FUSFSPA, to the extent it overruled McCarty in this respect, was unconstitutional. Alternatively, Husband argued that FUSFSPA itself did not authorize division of the retiree's

gross pay, and that his disability benefits should be excepted from the division provided for by paragraph six of the interlocutory and final judgments.

The Merced County Superior Court denied Husband's motion for modification of the interlocutory and final decrees on June 29, 1983, and Husband's subsequent motion for reconsideration was denied on August 1, 1983.

Husband appealed to this court on August 2, 1983, from the superior court's denial of his motion for modification, as well as from the denial of the subsequent motion for reconsideration. (We will henceforth treat the two motions, and the appeals therefrom, as one.) We affirmed the trial court's denial of the motion to modify the original judgment in an unpublished opinion encaptioned In re Marriage of Mansell. Husband's petition for review by the California Supreme Court was denied on April 29, 1987, and he thereafter sought and was granted review in the United States Supreme Court. In Mansell v. Mansell (1989) ___ U.S. ___ [109 S.Ct. 2023], the United States Supreme Court reversed our unpublished opinion and remanded the matter to this court "for further proceedings not inconsistent with" the opinion of the United States Supreme Court.[1]

DISCUSSION

Before addressing the contentions raised in the instance case, it would doubtless be helpful to discuss our opinion in Mansell I, inasmuch as that opinion was not published. In Mansell I, we were initially called upon to determine whether the trial court's denial of the motion to modify the original judgment was an appealable order. Without undue repetition, it is sufficient here to explain that we concluded that an appeal could be taken from that order.

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1. For the sake of brevity and ease of identification, we will refer to our unpublished opinion as Mansell I, and to the opinion of the United States Supreme Court as Mansell v. Mansell.

Having thus cleared the initial jurisdictional barrier on appeal, we then went on to reach "the merits of the appeal" in Mansell I, i.e., whether the order denying modification should stand. We concluded that the order was proper. In so deciding, we considered and rejected several arguments raised by Husband, foremost of which was that the lower court's 1979 judgment was void for lack of subject matter jurisdiction. Also rejected was Husband's contention that the judgment was the result of a mutual mistake of law.

In presentation to the United States Supreme Court, there appears to have arisen some question over whether the issues we addressed in Mansell I related to the merits of the trial court's 1983 order denying modification, or related instead to the merits of the 1979 judgment of dissolution.

> "In a supplemental brief, Mrs. Mansell argues that the doctrine of res judicata should have prevented this pre-McCarty property settlement from being reopened. McCarty v. McCarty, 453 U.S. 210 . . . (1981). The California Court of Appeal, however, decided that it was appropriate, under California law, to reopen the settlement and reach the federal question . . . Whether the doctrine of res judicata, as applied in California, should have barred the reopening of pre-McCarty settlements is a matter of state law over which we have no jurisdiction." (Mansell v. Mansell, supra, ___ U.S. at p. ___, fn. 5 [109 S.Ct at p. 2027].)

As we shall discuss infra, we are compelled to acknowledge that this conclusion reached by our high court may have resulted from a failure on our part to sufficiently detail whether we were addressing the judgment or the motion to reopen the judgment. However, in considering whether the 1979 final decree was void for lack of jurisdiction, and in determining whether it was the result of mutual mistake, we were not "reopening" the judgment. As we hope to make clear in this opinion, such examination of the judgment was necessary to properly determine whether the lower court had erred in 1983 when it refused to grant modification.

The order appealed from was a denial of Husband's motion to modify the judgment, a motion filed some four years after the 1979 final decree was entered. The moving papers and argument below are ambiguous as to whether the motion was based on statutory grounds or on equity. The final paragraph of Code of Civil Procedure section 473 has been held to permit a court to set aside a void judgment at any time on noticed motion (County of Ventura v. Tillet (1982) 133 Cal.App.3d 105, 110), and in fact Husband did argue below that the judgment was void for want of jurisdiction. On the other hand, a motion or action in equity is used to attack final judgments on grounds of fraud or mistake (see, e.g., Westphal v. Westphal (1942) 20 Cal.2d 393, 397), and Husband relied on mistake as a basis for relief as well.

The two forms of attack serve distinct purposes.

> "The law is not inflexibly harsh with a divorced spouse who finds himself saddled with an invalid judgment past the point of appeal. He may attack the judgment in a collateral proceeding if it is void on the face of the judgment roll. [Citation.] He may also seek equitable relief, by motion or separate action, for extrinsic fraud or mistake which prevented him from presenting his case. [Citation.]" (Swain v. Swain (1967) 250 Cal.App.2d 1, 13 (dis. opn. of Friedman, J.).)

It appears Husband's motion was intended to be both a statutory and an equitable attack. In either case, the scope of review is limited to determining whether or not the lower court's ruling was an abuse of discretion. (Roberts v. Roberts (1966) 245 Cal.App.2d 637, 639 [statutory motion].) However, in addressing this question in Mansell I, we of necessity had to examine the record for a jurisdictional error such as would render the 1979 judgment void, and for the kinds of mistake or fraud that would have justified equitable relief. Had we found such elements to exist in the judgment below, we might well have concluded that the lower court's refusal to modify was an abuse of discretion.

In the portion of Mansell I addressing whether the lower court had jurisdiction to enter the 1979 judgment, we expressly relied on Casas v. Thompson (1986) 42 Cal.3d 131 in concluding that such juris-

diction was vested in the superior court both before McCarty was decided and after. We pointed out that the judgment in Casas was itself "both post McCarty and post-FUSFSPA," unlike the instant case, in which the property division was ordered prior to either McCarty or FUSFSPA. We nonetheless cited Casas as controlling authority. Our reason for doing so, as we stated in Mansell I, was that Husband was making the same argument as had the former serviceman in Casas: that FUSFSPA, at minimum, expressly prohibited state courts from dividing that portion of the retirement pay the former service person elected to receive as disability compensation." We were able to refute this argument by simple reliance on Casas. We similarly relied on Casas in our rejection of Husband's "mutual mistake of law" argument.

Our Mansell I affirmance of the 1983 order refusing to modify the judgment thus reflected our conclusion that Husband had shown no justification in law or equity for reopening the 1979 final decree of dissolution, and that the trial court had therefore not abused its discretion in refusing to modify the decree.

In reversing Mansell I, the United States Supreme Court impliedly overruled Casas to the extent Casas held that "after the passage of [FUSFSPA], federal law no longer pre-empted state community property law as it applies to [total] military retirement pay." (___ U.S. at p. ___ [109 S.Ct. at p. 2027].) We reiterate, however, that Casas dealt with a post-McCarty, post-FUSFSPA division of retirement benefits; the instant case does not.

In any event, the Supreme Court's implicit rejection of Casas and its reasoning does not resolve the question before this court on remand. That question is the same one before this court in Mansell I, i.e., whether the lower court's refusal to grant modification of a long-final, pre-McCarty divorce decree constituted an abuse of discretion. The Supreme Court's removal of part or all of Casas from the legal landscape does not change the question on review; it merely requires that we view it from a new perspective. We pose the question once again, then, in light of the United States Supreme Court's decision in Mansell v. Mansell rejecting the reasoning in Casas: Did the court

below abuse its discretion by denying Husband's motion to modify the judgment? We find, once again, that it did not.

Voidness of Judgment for Want of Jurisdiction

As we have indicated ante, Husband contends the instant judgment was void for want of subject matter jurisdiction. This contention, if true, would be a proper basis for attacking the judgment. (Code Civ. Proc., § 473.) In effect, Husband contends the superior court lacked subject matter jurisdiction at the time the final decree was entered in 1979, that such jurisdiction cannot be conferred on the court by the parties, and that the judgment purporting to impose a division of his retirement pay was therefore void. Husband maintains he had the right to attack the judgment despite its apparent finality.

Husband is correct in his claim that the parties' stipulated property division could not confer subject matter jurisdiction in the superior court.. (See e.g., Summers v. Superior Court (1959) 53 Cal.2d 295, 298.) The question here, then, is whether the court had subject matter jurisdiction in the first instance.

Husband's current argument against subject matter jurisdiction rests in part on language in the Supreme Court's Mansell v. Mansell opinion to the effect that, at the time FUSFSPA was before Congress in 1982, "pre-existing federal law, as interpreted by [the Supreme] Court, completely pre-empted the application of state community property law to military retirement pay, . . . " (___ U.S. at p. ___ [109 S.Ct. at p. 2028].) He interprets this as a reservation of jurisdiction over retirement pay.

The language relied on by Husband was not part of the holding in Mansell v. Mansell; rather, it was in a portion of the opinion setting out the historical background of the case. The language is mere acknowledgment by the Supreme Court of its decision in McCarty v. McCarty, supra, 453 U.S. 210. The McCarty opinion, as further characterized elsewhere in Mansell v. Mansell, "held that the federal statutes then governing military retirement pay prevented state courts from treating military retirement pay as community property. We concluded that treating such

pay as community property would do clear damage to important military personnel objectives." (___ U.S. at p. ___ [109 S.Ct. at p. 2026].)

Neither McCarty nor in Mansell v. Mansell did the Supreme Court refer to subject matter jurisdiction over retirement or disability pay. Indeed, the McCarty court characterized the question before it, not as whether a state court had jurisdiction to divide military retirement benefits, but rather whether it could do so pursuant to state, rather than federal, law. (McCarty, supra, 453 U.S. at p. 211.) The holding in McCarty that federal law pre-empted state law in this area simply meant that state courts were bound to apply federal law in determining the character of military pension benefits. There was no divestiture of jurisdiction.

This conclusion is amply supported by In re Marriage of Thomas (1984) 156 Cal.App.3d 631. In that case, the husband was not directly challenging the division of his military retirement benefits; instead, he was challenging the court's authority to hold him in contempt for refusing to turn over to his wife her court-ordered share of those benefits. The argument, however, was the same: "the portion of [the] 1975 divorce decree awarding part of [husband's] military retirement benefits to [wife] is void for lack of subject matter jurisdiction because McCarty holds Congress, in enacting the federal military retirement pay system, affirmatively deprived the state courts of the power to divide military retirement pay under state community property laws." (156 Cal.App.3d at p. 635.)

The Thomas court first noted the distinction

> "between preemption occurring when a congressional enactment expressly or impliedly prohibits the states' exercise of jurisdiction over certain subject matter [citations], and that type of superseding which occurs where state law and federal law are so inconsistent that state law must 'give way' because it impedes the accomplishment and execution of Congress' full purposes and objectives. [Citations] This latter type of preemption requires states to defer their interests, under the supremacy clause, to federal interests, even though Congress has not ex-

pressed an intent to preclude state court jurisdiction. [Citation.]"

"The distinction between the two types of preemption is significant. Where Congress exercises its plenary power to deprive state courts of jurisdiction over a particular subject, state court judgments purporting to exercise jurisdiction over the preempted subject are 'nullities and vulnerable collaterally.' [Citation.] Where, as in McCarty, a court interprets Congress' actions as 'superseding' or 'overriding' state law, this judicial finding of conflict does not necessarily imply a withholding of subject matter jurisdiction, although the enforcement of conflicting state judgments may be avoided by direct appeal." (156 Cal.App.3d at p. 636.)

Having recognized the distinction, the Thomas court then determined that the preemption recognized by McCarty fell within the second category, and that no withholding of subject matter jurisdiction, express or implied, could be found. (See also In re Marriage of Castle (1986) 180 Cal.App.3d 206, 213, 214.)

Husband's arguments have presented no persuasive reason for this court to deviate from the reasoning and holdings in Thomas or Castle, and we therefore conclude that subject matter jurisdiction was vested in the superior court when the final decree was entered. While under the reasoning in McCarty the court should have applied federal rather than state law in determining the character of the retired pay, it was within the court's jurisdiction to make that characterization, right or wrong. The judgment was therefore not void for want of subject matter jurisdiction.

We do not consider this holding to be in conflict with Mansell v. Mansell, as we do not agree with Husband that the Supreme Court therein held state courts to be without subject matter jurisdiction where military disability pay is concerned. Rather, the Supreme Court's holding was quite narrow: FUSFSPA does not alter, with regard to nondisposable retired or retainer pay (including the pay at issue herein), the

already-exising federal statutory structure which, according to McCarty, preempts state community property law. To the extent that Mansell v. Mansell is law of the case herein, it has no impact on the question of subject matter jurisdiction.

Voidness of Judgment for Act
In Excess of Jurisdiction

Even though a court has subject matter jurisdiction and jurisdiction over the parties, its actions may be in excess of its jurisdiction. If the superior court acted in excess of its jurisdiction in its 1979 decree, a basis may be demonstrated for vacating the trial court's judgment by direct attack. (2 Witkin, Cal. Procedure (3d ed. 1985) Jurisdiction, § 266 p. 664.)

We conclude, however, that the actions of the trial court were not in excess of its jurisdiction. Estate of Gardiner (1941) 45 Cal.App.2d 559 provides that a judgment entered contrary to substantive law does not fall to the level of being in excess of the trial court's jurisdiction. In Gardiner, the petitioner sought to vacate a 38-year-old probate decree by arguing the decree was in excess of the jurisdiction of the superior court and thus void. The Superior Court refused to reopen the judgment, and the appellate court agreed. The weight and authority of the holding of the Gardiner court has not diminished with the passage of time. The language of Presiding Justice Moore of the Second District bears repeating:

> "Where a statute specifically inhibits an act, it is error for the court to do the thing prohibited. But, if the Constitution has conferred upon a court the power to deal with the subject matter and if jurisdiction over the parties has been acquired pursuant to the exercise of due process, its judgment is valid and it is conclusive, however erroneous, unless reversed on appeal.... A decree is void if the court be destitute of jurisdiction, otherwise it is valid and final unless by reason of material error in the application of substantive law it be reversed. Jurisdiction is the power to hear and determine and is not in the least dependent upon the ability of the judge to reason correctly or to act in-

corruptibly. If the court, in the exercise of its jurisdiction enters a decree affecting property rights contrary to statute, the court is guilty of error of judgment. Neither does such error render void the decree nor does the fact that the error may appear upon the face of the judgment itself indicate its nullity. An erroneous decree which is not void on its face is forever binding and conclusive upon the parties named, upon the status defined, or upon the property described, unless upon motion seasonably made it be vacated or upon appeal it be reversed.

"At times the primary function of the trial court is to determine questions of fact. Even though such findings be utterly contrary to the evidence, the decree is not for that reason void. Similarly the court's defiance or ignorance of an express statute or of the decisions of the courts of last resort does not render its judgment a nullity. The composition of a judgment is derived from an attempt to apply the law to the facts in question. If the court decides the law and the facts both wrong, or the facts right and the law wrong, or the law right and the facts wholly wrong, it is still a final judgment if the time for appeal elapses. The fact that a court shall decide erroneously does not affect the validity or the finality of a judgment any more than to decide correctly. The duty of the court in every controversy or proceeding is to decide right. Such duty implies that the court may decide wrong. Its jurisdiction is not defeated or limited by a wrong decision. To say that its judgment is final when right and interlocutory when wrong would open to attack the myriad of erroneous decrees that have confirmed the fallibility of man since Coke struck the royal shackles from the hands of a cringing judiciary. It would provide an orgy for the prurient army of litigious to the detriment of the peace, security and contentment of society." (45 Cal.App.2d at pp. 562-563.)

Even if Husband were correct in contending the division of his gross retired pay would otherwise have been an act in excess of jurisdiction, he consented to said act when he signed the stipulated property settlement agreement, and he is therefore barred from complaining.[2]

In Spahn v. Spahn (1945) 70 Cal.App.2d 791, the spouses had stipulated to the court's determination of the parties' rights in the various property acquired during marriage, including a certain parcel of real property. The court's written order dividing the marital property ordered that the real property be held in joint tenancy with the right of survival, and further ordered that the husband lease the wife's interest for her lifetime at $100 per month. At the end of the order, the court stated: "By stipulation of both parties as well as counsel, the above order is hereby made." (Id. at p. 794.)

After over a year had passed, Mr. Spahn sought to amend the judgment, claiming as to the provisions relating to the real estate that "'said portion is in excess of the jurisdiction of the court and is void and of no effect.'" (70 Cal.App.2d at p. 794.) The claim was based on his assertion that the real estate was actually his separate property. The motion was denied, and Mr. Spahn appealed from the denial.

The Court of Appeal affirmed, in the process addressing and rejecting several of the arguments made by Husband in the instant case. Chief among them was the contention that the court had no jurisdiction to dispose of anything but community property. The Court of Appeal,

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2. In Mansell I we noted that the trial court specifically retained jurisdiction over the retirement and disability benefits in its original order: "7. Jurisdiction over the distribution of petitioner's share of the retirement pay and compensation from the Veterans' Administration accrued through respondent's employment with the United States Air Force is expressly reserved by the court." We did not then and we do not now view this statement as a reservation of the issue of allocation of the property but, rather, as a means of overseeing enforcement of the judgment as to payment and inclusion of pay adjustments.

after a lengthy survey of case law contrary to the argument, concluded that "whatever the character of the property, whether community or separate, the parties had by their pleadings and stipulation, made its disposition an issue for the court to decide. Under the California cases to which attention has been directed, the trial court then had full jurisdiction to decide such issue." (70 Cal.App.2d at p. 798.)

We conclude, therefore, that Husband's stipulation to division of the gross retirement pay as community property obviates any contention he might make that such division was an act in excess of jurisdiction.

Mutual Mistake of Law

Husband has contended at various times that the division of the disability pay was the product of a mutual mistake of law in the formulation of the stipulated settlement agreement and the resultant interlocutory and final decrees. This asserted mistake would presumably be that both parties wrongfully believed the disability pay to be divisible community property. Husband contends such a mutual mistake is a basis for the court to vacate and/or modify its final judgment. However, "A mutual mistake which would be sufficient to otherwise set aside a contract is not sufficient to set aside a valid judgment incorporating a marital settlement agreement. Even though a party is mistaken as to the law and the facts, this is an insufficient basis to set aside a valid judgment incorporating a marital settlement agreement, if the party reasonably could have discovered the mistakes." (In re Marriage of Stevenot (1984) 154 Cal.App.3d 1051, 1069-1070.)

Husband contends the parties could not "reasonably . . . have discovered" the asserted mutual mistake of law. This argument, while possessed of a certain facial appeal, depends on the assumption that a mutual mistake of law in fact took place. As shall be demonstrated, no such mistake was made.

In 1979, at the time the parties stipulated to a division of Husband's retirement and disability benefits, the law in California clearly held such payments to be divisible community property. (In re Marriage of Fithian (1974) 10 Cal.3d 592.) If the settlement agreement

below was drafted with an eye towards Fithian, there was no legal "mistake" involved.

Fithian and like cases were overruled by the United States Supreme Court in McCarty v. McCarty, supra, 453 U.S. 210. McCarty "held that the federal statutes then governing military retirement pay prevented state courts from treating military retirement pay as community property." (Mansell v. Mansell, supra, ___ U.S. at p. ___ [109 S.Ct. at p. 2026].) However, the California courts have consistently refused to apply McCarty retroactively.

> "To permit and in fact encourage the relitigation of property interests long after the issues were supposedly settled would merely serve to reopen old wounds and create new ones. There is no guarantee that the nonservice member spouse would have assets sufficient to reimburse the service member for that portion of the pension rights which had previously been an awarded share of community property. Substantial hardship would result in cases where the nonmember relied on the property settlement in converting his or her share into nonliquid assets. Moreover, a reallocation of property interests would likely constitute sufficient 'changed circumstances' to trigger a second round of relitigation involving spousal support awards. [Citations.] We also note the immense burden on the administration of justice in our civil courts were such relitigation permitted. Under these circumstances, we conclude that a fully retroactive application of McCarty would be inimical to the principles of equity and fairness which underlie this state's family law system. Finding nothing in the nature or rationale of the McCarty decision which mandates a retroactive effect, we hold McCarty is inapplicable where the property rights in the military pension have been determined by a dissolution judgment which became final before the filing of the United States Supreme Court's opinion...." (In re Marriage of Sheldon (1981) 124 Cal.App.3d 371, 380, fn. omitted. See also, e.g., In re Marriage of Camp (1983) 142 Cal.App.3d 217; In re Marriage of

Fellers (1981) 125 Cal.App.3d 254; In re Marriage of Mahone (1981) 123 Cal.App.3d 17; In re Marriage of McGhee (1982) 131 Cal.App.3d 408.)

Since McCarty, a 1981 decision, was not to be retroactively applied to judgments final prior to the date of the decision, McCarty had and has no effect on the 1979 final judgment below.

In 1982, in "direct response" to McCarty (Mansell v. Mansell, supra, ___ U.S. at p. ___ [109 S.Ct. at p. 2026]), Congress passed FUSFSPA. FUSFSPA made no direct reference to the divisibility or nondivisibility of the property at issue here, military disability pay; rather, it merely stated that "a court may treat disposable retired or retainer pay . . . either as property solely of the member or as property of the member and his spouse in accordance with the law of the jurisdiction of such court." (10 U.S.C. § 1408(c)(1).) While this "affirmative grant of authority" (___ U.S. at p. ___ [109 S.Ct. at p. 2028]) apparently overruled McCarty as regards disposable retired or retainer pay, it did nothing to change McCarty's effect on non-disposable pay, including husband's disability pay; such pay is, under McCarty, the separate property of the retired service person.

That FUSFSPA made no change in the law controlling non-disposable retired or retainer pay (including the pay at issue here) is manifest from the manner in which the United States Supreme Court framed and treated the argument in this case:

> "Mrs. Mansell views [FUSFSPA' as a complete congressional rejection of McCarty's holding that state law is pre-empted; she reads the Act as restoring to state courts all pre-McCarty authority. Major Mansell, supported by the Solicitor General, argues that [FUSFSPA] is only a partial rejection of the McCarty rule that federal law preempts state law regarding military retirement pay." (___ U.S. at p. ___ [109 S.Ct. at p. 2028].) In other words, Husband was correct in arguing that FUSFSPA was merely a "partial rejection" of McCarty. Other than the authority expressly conveyed by FUSFSPA, McCarty

remained determinative of the limits of state authority to characterize military retirement benefits.

Clearly, then, FUSFSPA itself effected no change to the parties' rights regarding the disability pay. Under McCarty, disability pay was not community property and FUSFSPA did not change McCarty's characterization. Husband must therefore rely on McCarty as being the post-judgment change in law proving the mutual mistake of law asserted. As we have already observed, however, the California courts, including this one, have overwhelmingly found McCarty to have no effect on judgments final prior to its 1981 filing date.

"[A] mistake of law is when a person knows the facts as they really are but has a mistaken belief as to the legal consequences of those facts." (Hodge Sheet Metal Products v. Palm Springs Riviera Hotel (1961) 189 Cal.App.2d 653, 656; see Baratti v. Baratti (1952) 109 Cal.App.2d 917, 921.) Here the parties' belief at the time the interlocutory and final decrees were entered was that military disability pay was divisible as community property. The belief was, at that time, correct. The mere fact that in 1982 or today a court might be required to reach a different result due to intervening interpretations of the law does not mean that, in 1979, Husband and Wife were operating under a mistaken impression of the law as it was applied at that time. A post-judgment, non-retroactive reinterpretation of the law is not a basis for disturbing a final judgment. (see, e.g., Slater v. Blackwood (1975) 15 Cal.3d 791; Zeppi v. California (1962) 203 Cal.App.2d 386.) In short, there was no mutual mistake of law that would support an attack on the judgment.

Applicability of California
Rule of Court, Rule 28

Husband contends that, when he sought review by the California Supreme Court of our decision in Mansell I, Wife waived the issue of res judicata by not filing an answer pursuant to California Rules of Court, rule 28.

Failure to raise an issue by way of answer does not necessarily foreclose consideration of that issue by the Supreme Court. Rule

28(e)(2) provides in part: "Only the issues set forth in the petition and answer or fairly included in them need be considered by the court." The Advisory Committee Comment states that, "The committee expects the Supreme Court to follow the practice of the United States Supreme Court under its rule 21.1, and decline (in most cases) to consider the merits of questions that were not set out in the petition for review or answer. However, the rule does not limit the Supreme Court's power to make exceptions."

It therefore does not follow that an issue is necessarily foreclosed because the prevailing party in the Court of Appeal does not raise it by way of cross-petition or answer, since, had the California Supreme Court granted review, it was free to consider the issue.

In any event, we do not read rule 28 as requiring that a prevailing party in the Court of Appeal preserve by way of answer an issue on which she was victorious. As we have already suggested, and as we shall explain in greater detail infra, the question before this court in Mansell I was whether the original judgment should be left undisturbed. Wife prevailed on that issue. Implicit in that victory was a determination that the 1979 judgment was final and binding on the parties, i.e,, res judicata. We find no reason to conclude Wife must either affirmatively bring before the Supreme Court an issue on which she prevailed in the Court of Appeal or waive any right to reassert it on subsequent remand.

Effect of United States
Supreme Court Opinion on
Conclusions Reached in Mansell I
And the Instant Case.

Although the Mansell I opinion did not employ the term "res judicata," the question before this court at the time, and the question before it now, was whether the superior court had erred in denying Husband's motion for modification of a final judgment. It was that question which we answered in the negative, relying on Casas v. Thompson to find that regardless of when the judgment was entered, the court had the power and jurisdiction to divide the community

property. The essence of our holding in Mansell I was that there was an insufficient showing to disturb a final judgment.

We recognize the United States Supreme Court did not construe this to be the basis of the decision in Mansell I. In footnote 5 of Mansell v. Mansell, the Supreme Court states that, "The California Court of Appeal, however, decided that it was appropriate, under California law, to reopen the settlement and reach the federal question." (___ U.S. at p. ___, fn. 5 [109 S.Ct. at p. 2027].) As we have noted, under California law, there was, and is, no basis to reopen the settlement and reach the federal question. However, we should not and do not leave unsaid the conclusion that the ambiguity of our language may have led to the inference drawn by our high court. We can only say we did not do what we could not do. We did not "reopen the settlement"; indeed, we addressed the federal question only to demonstrate there was no basis for reopening the settlement. This determination necessarily was one of state law, although our rationale for reaching it involved resolution of a federal question.

As we have already stated, the propriety of the superior court's refusal to exercise its powers in equity to reopen the judgment was the only question before this court. Our prior opinion should be read in that light. "Language used in any opinion is of course to be understood in light of the facts and the issue then before the court, . . . " (Ginns v. Savage (1964) 61 Cal.2d 520, 524, fn. 2.) Likewise, Husband, in briefing following remand, appears to suggest our statement that, "This court must therefore reach the merits of the appeal in this case" indicated that the Mansell I opinion directly addressed the merits of the 1979 judgment. As we have stated, it did not. Wife correctly notes that, by reaching "the merits of the appeal," we reached only the question of whether the lower court's denial of Husband's 1983 motion for modification was proper. Our opinion in Mansell I scrutinized the 1979 proceedings for the sole purpose of deciding whether an error had occurred that was of such a nature as would have justified granting the motion for modification; Casas resolved that question without further inquiry.

The trial court's denial of the motion to vacate and modify the judgment herein is affirmed. Wife to receive costs.

/s/ Ardaiz, J.

WE CONCUR:

/s/ Stone (Wm. A.)
Acting P.J.

/s/ Brown, (Geo. A.)
J.*

* Retired Presiding Justice of the Court of Appeal sitting under assignment by the Chairperson of the Judicial Council.

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STATE OF CALIFORNIA
COURT OF APPEAL
FIFTH APPELLATE DISTRICT
P.O. BOX 45013
FRESNO, CA 93718

JAMES A. ARDAIZ (209) 445-5608
ASSOCIATE JUSTICE

February 1, 1990

Mr. Edward W. Jessen, Reporter of Decisions
Supreme Court of California
4206 State Building
San Francisco, CA 94102

Re: Marriage of Mansell
F002872

Dear Mr. Jessen:

The above entitled opinion was filed in this court on December 18, 1989, and certified for publication.

In typing the opinion from the final draft, a clerical error was made in omitting to specify that the opinion was for partial publication only.

The part to be omitted begins on page 19, line 16, and is entitled "Applicability of California Rules of Court, Rule 28," and ends on page 20, line 22.

Please make these corrections.

Yours very truly,

/s/
JAMES A. ARDAIZ

Appendix H

Court of Appeal
Fifth Appellate District
FILED
Jan 16 1990
Kevin A. Swanson, Clerk

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT

In re the Marriage of GAYE M. and GERALD E. MANSELL	)	F002872
	)	
	)	(Super. Ct. No. 55594)
GAYE M. MANSELL, Plaintiff and Respondent,	)	
v.	)	
GERALD E. MANSELL, Defendant and Appellant.	)	ORDER

Appellant's petition for rehearing in the above entitled matter is denied.

Dated: Jan 16, 1990

/s/
JAMES A. ARDAIZ, J.

I CONCUR:
/s/
WILLIAM A STONE, Acting P.J.

Appendix I

SUPREME COURT
FILED
Mar 29, 1990
Robert Wandruff, Clerk

ORDER DENYING REVIEW
AFTER JUDGMENT BY THE COURT OF APPEAL
Fifth Appellate District No. F002872
S000361
IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN BANK

In Re the Marriage of GAYE M. AND GERALD E MANSELL

GAYE M. MANSELL, Respondent

v.

GERALD E. MANSELL, Appellant

Appellant's petition for review DENIED

LUCAS
Chief Justice

APPENDIX J
Texts of Constitutional and Statutory Provisions

U.S. Constitution, Article VI, Clause 2

Supreme Law of Land

The Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

TITLE 5 U.S.C.

§8345. Payment of benefits; commencement, termination, and waiver of annuity

(j)(1) Payments made under this subchapter which would otherwise be made to an employee, Member, or annuitant based upon his service shall be paid (in whole or in part) by the Office to another person if and to the extent expressly provided for in the terms of any court decree of divorce, annulment, or legal separation, or the terms of any court order or court-approved property settlement agreement incident to any court decree of divorce, annulment, or legal separation. Any payment under this paragraph to a person bars recovery by any other person.

TITLE 10 U.S.C.

§1408. Payment of retired or retainer pay in compliance with court orders

(a) In this section:

(1) "Court" means--

(A) any court of competent jurisdiction of any State, the District of Columbia, the Commonwealth of Puerto Rico,

Guam, American Samoa, the Virgin Islands, the Northern Mariana Islands and the Trust Territory of the Pacific Islands;

(B) any court of the United States (as defined in section 451 of title 28) having competent jurisdiction; and

(C) any court of competent jurisdiction of a foreign country with which the United States has an agreement requiring the United States to honor any court order of such country.

(2) "Court order" means a final decree of divorce, dissolution, annulment, or legal separation issued by a court, or a court ordered, ratified, or approved property settlement incident to such a decree (including a final decree modifying the terms of a previously issued decree of divorce, dissolution, annulment, or legal separation, or a court ordered, ratified, or approved property settlement incident to such previously issued decree), which--

(A) is issued in accordance with the laws of the jurisdiction of the court;

(B) provides for--

(i) payment of child support (as defined in section 462(b) of the Social Security Act (42 U.S.C. 662(b));

(ii) payment of alimony (as defined in section 462(c) of the Social Security Act (42 U.S.C. 662(c)); or

(iii) division of property (including a division of community property); and

(C) in the case of a division of property, specifically provides for the payment of an amount, expressed in dollars or as a percentage of disposable retired or retainer pay, from the disposable retired or retainer pay of a member to the spouse or former spouse of that member.

(3) "Final decree" means a decree from which no appeal may be taken or from which no appeal has been taken within the time allowed for taking such appeals, under the laws applicable to such appeals or a decree from which timely appeal

has been taken and such appeal has been finally decided under the laws applicable to such appeals.

(4) "Disposable retired or retainer pay" means the total monthly retired or retainer pay to which a member is entitled less amounts which--

(A) are owed by that member to the United States;

(B) are required by law to be and are deducted from the retired or retainer pay of such member, including fines and forfeitures ordered by courts-martial, Federal employment taxes, and amounts waived in order to receive compensation under title 5 or title 38;

(C) are properly withheld for Federal, State, or local income tax purposes, if the withholding of such amounts is authorized or required by law and to the extent such amounts withheld are not greater than would be authorized if such member claimed all dependents to which he was entitled;

(D) are withheld under section 3402(i) of the Internal Revenue Code of 1954 (26 U.S.C. 3402(i)) if such member presents evidence of a tax obligation which supports such withholding;

(E) in the case of a member entitled to retired pay under chapter 61 of this title, are equal to the amount of retired pay of the member under that chapter computed using the percentage of the member's disability on the date when the member was retired (or the date on which the member's named was placed on the temporary disability retired list); or

(F) are deducted because of an election under chapter 73 of this title to provide an annuity to a spouse or former spouse to whom payment of a portion of such member's retired or retainer pay is being made pursuant to a court order under this section.

(5) "Member" includes a former member.

(6) "Spouse or former spouse" means the husband or wife, or former husband or wife, respectively, of a member who, on or before the date of a court order, was married to that member.

(b) For the purposes of this section-

(1) service of a court order is effective if--

(A) an appropriate agent of the Secretary concerned designated for receipt of service of court orders under regulations prescribed pursuant to subsection (h) or, if no agent has been so designated, the Secretary concerned, is personally served or is served by certified or registered mail, return receipt is requested;

(B) the court order is regular on its face;

(C) the court order or other documents served with the court order identifying the member concerned and include, if possible, the social security number of such member; and

(D) the court order or other documents served with the court order certify that the rights of the member under the Soldiers' and Sailors' Civil Relief Act of 1940 (50 U.S.C.App. 501 et seq.) were observed; and

(2) a court order is regular on its face if the order--

(A) is issued by a court of competent jurisdiction;

(B) is legal in form; and

(C) includes nothing on its face that provides reasonable notice that it is issued without authority of law.

(c)(1) Subject to the limitations of this section, a court may treat disposable retired or retainer pay payable to a member for pay periods beginning after June 25, 1981, either as property solely of the member or as property of the member and his spouse in accordance with the law of the jurisdiction of such court.

(2) Notwithstanding any other provision of law, this section does not create any right, title, or interest which can be sold, assigned or transferred, or otherwise disposed of (including by inheritance) by a spouse or former spouse.

(3) This section does not authorize any court to order a member to apply for retirement or retire at a particular time in order to effectuate any payment under this section.

(4) A court may not treat the disposable retired or retainer pay of a member in the manner described in paragraph (1) unless the court has jurisdiction over the member by reason of (A) his residence, other than because of military assignment, in the territorial jurisdiction of the

court, (B) his domicile in the territorial jurisdiction of the court, or (C) his consent to the jurisdiction of the court.

(d)(1) After effective service on the Secretary concerned of a court order providing for the payment of child support or alimony or, with respect to a division of property, specifically providing for the payment of an amount of the disposable retired or retainer pay from a member to the spouse or former spouse of the member, the Secretary shall make payments (subject to the limitations of this section) from the disposable retired or retainer pay of the member to the spouse or former spouse in an amount sufficient to satisfy the amount of child support and alimony set forth in the court order and, with respect to a division of property, in the amount of disposable retired or retainer pay specifically provided for in the court order. In the case of a member entitled to receive retired or retainer pay on the date of the effective service of the court order, such payments shall begin not later than 90 days after the date of effective service. In the case of a member not entitled to receive retired or retainer pay on the date of the effective service of the court order, such payments shall begin not later than 90 days after the date on which the member first becomes entitled to receive retired or retainer pay.

(2) If the spouse or former spouse to whom payments are to be made under this section was not married to the member for a period of 10 years or more during which the member performed at least 10 years of service creditable in determining the member's eligibility for retired or retainer pay, payments may not be made under this section to the extent that they include an amount resulting from the treatment by the court under subsection (c) of disposable retired or retainer pay of the member as property of the member or property of the member and his spouse.

(3) Payments under this section shall not be made more frequently than once each month, and the Secretary concerned shall not be required to vary normal pay and disbursement cycles for retired or retainer pay in order to comply with a court order.

(4) Payments from the disposable retired or retainer pay of a member pursuant to this section shall terminate in accordance with the terms of the applicable court order, but not later than the date of death of the

member or the date of the death of the spouse or former spouse to whom payments are being made, whichever occurs first.

(5) If a court order described in paragraph (1) provides for a division of property (including a division of community property) in addition to an amount of child support or alimony or the payment of an amount of disposable retired or retainer pay as the result of the court's treatment of such pay under subsection (c) as property of the member and his spouse, the Secretary concerned shall pay (subject to the limitations of this section) from the disposable retired or retainer pay of the member to the spouse or former spouse of the member, any part of the amount payable to the spouse or former spouse under the division of property upon effective service of a final court order of garnishment of such amount from such retired or retainer pay.

(e)(1) The total amount of the disposable retired or retainer pay of a member payable under subsection (d) may not exceed 50 percent of such disposable retired or retainer pay.

(2) In the event of effective service of more than one court order which provide for payment to a spouse and one or more former spouses or to more than one former spouse, the disposable retired or retainer pay of the member shall be used to satisfy (subject to the limitations of paragraph (1)) such court orders on a first-come, first-served basis. Such court orders shall be satisfied (subject to the limitations of paragraph (1)) out of that amount of disposable retired or retainer pay which remains after the satisfaction of all court orders which have been previously served.

(3)(A) In the event of effective service of conflicting court orders under this section which assert to direct that different amounts be paid during a month to the same spouse or former spouse of the same member, the Secretary concerned shall--

> (i) pay to that spouse from the member's disposable retired or retainer pay the least amount directed to be paid during that month by such conflicting court order, but not more than the amount of disposable retired or retainer pay which mains available for payment of such court orders based on when such court orders were effectively served and the

limitations of paragraph (1) and subparagraph (B) of paragraph (4);

(ii) retainer an amount of disposable retired or retainer pay that is equal to the lesser of--

(I) the difference between the largest amount required by any conflicting court order to be paid to the spouse or former spouse and the amount payable to the spouse or former spouse under clause (i); and

(II) the amount of disposable retired or retainer pay which remains available for payment of any conflicting court order based on when such court order was effectively served and the limitations of paragraph (1) and subparagraph (B) of paragraph (4); and

(iii) pay to that member the amount which is equal to the amount of that member's disposable retired or retainer pay (less any amount paid during such month pursuant to legal process served under section 459 of the Social Security Act (42 U.S.C. 659) and any amount paid during such month pursuant to court orders effectively served under this section, other than such conflicting court order) minus--

(I) the amount of disposable retired or retainer pay paid under clause (i); and

(II) the amount of disposable retired or retainer pay retained under clause (ii).

(B) The Secretary concerned shall hold the amount retained under clause (ii) of subparagraph (a) until such time as that Secretary is provided with a court order which has been certified by the member and the spouse or former spouse to be valid and applicable to the retained amount. Upon being provided with such an order, the Secretary shall pay the retained amount in accordance with the order.

(4)(A) In the event of effective service of a court order under this section and the service of legal process pursuant to section 459 of the Social Security Act (42 U.S.C. 659), both of which provide for payments during

a month from the same member, satisfaction of such court orders and legal process from the retired or retainer pay of the member shall be on a first-come, first-serve basis. Such court orders and legal process shall be satisfied out of moneys which are subject to such orders and legal process and which remain available in accordance with the limitations of paragraph (1) and subparagraph (B) of this paragraph during such month after the satisfaction of all court orders or legal process which have been previously served.

(B) Notwithstanding any other provision of law, the total amount of the disposable retired or retainer pay of a member payable by the Secretary concerned under all court orders pursuant to this section and all legal processes pursuant to section 459 of the Social Security Act (42 U.S.C. 659) with respect to a member may not exceed 65 percent of the disposable retired or retainer pay payable to such member.

(5) A court order which itself or because of previously served court orders provides for the payment of an amount which exceeds the amount of disposable retired or retainer pay available for payment because of the limit set forth in paragraph (1), or which, because of previously served court orders or legal process previously served under section 459 of the Social Security Act (42 U.S.C. 659), provides for payment of an amount that exceeds the maximum amount permitted under paragraph (1) or subparagraph (B) of paragraph (4), shall not be considered to be irregular on its face solely for that reason. However, such order shall be considered to be fully satisfied for purposes of this section by the payment to the spouse or former spouse of the maximum amount of disposable retired or retainer pay permitted under paragraph (1) and subparagraph (B) of paragraph (4).

(6) Nothing in this section shall be construed to relieve a member of liability for the payment of alimony, child support, or other payments required by a court order on the grounds that payments made out of disposable retired or retainer pay under this section have been made in the maximum amount permitted under paragraph (1) or subparagraph (B) of paragraph (4). Any such unsatisfied obligation of a member may enforced by any means available under law other than the means provided under this section in any case in which the maximum amount permitted under paragraph (1) has been paid and under section 459 of

the Social Security Act (42 U.S.C. 659) in any case in which the maximum amount permitted under subparagraph (B) of paragraph (4) has been paid.

(f)(1) The United States and any officer or employee of the United States shall not be liable with respect to any payment made from retired or retainer pay to any member, spouse, or former spouse pursuant to court order that is regular on its face if such payment is made in accordance with this section and the regulations prescribed pursuant to subsection (h).

(2) An officer or employee of the United States who, under regulations prescribed pursuant to subsection (h), has the duty to respond to interrogatories shall not be subject under any law to any disciplinary action or civil or criminal liability or penalty for, or because of, any dis closure of information made by him in carrying out any of his duties which directly or indirectly pertain to answering such interrogatories.

(g) A person receiving effective service of a court order under this section shall, as soon as possible, but not later than 30 days after the date on which effective service is made, send a written notice of such court order (together with a copy of such order) to the member affected by the court order at his last kno n residence.

(h) The Secretaries concerned shall prescribe uniform regulations for the administration of this section.

TITLE 28 U.S.C.

§1257. State courts; appeal; certiorari

(a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

(b) For the purposes of this section, the term "highest court of a State" includes the District of Columbia Court of Appeals.

TITLE 28 U.S.C.

§1651. Writs.

(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

(b) An alternative writ or rule nisi may be issued by a justice or judge of a court which has jurisdiction.

TITLE 38 U.S.C.

§310. Basic Entitlement

For disability resulting from personal injury suffered or disease contracted in line of duty, or for aggravation of a pre-existing injury suffered or disease contracted in line of duty, in the active military, naval, or air service, during a period of war, the United States will pay to any veteran thus disabled and who was discharged or released under conditions other than dishonorable from the period of service in which said injury or disease was incurred, or pre-existing injury or disease was aggravated, compensation as provided in this subchapter, but no compensation shall be paid if the disability is the result of the veteran's own willful misconduct.

TITLE 38 U.S.C.

§314. Rates of wartime disability compensation

For purpose of section 310 of this title--

(a) if and while the disability is rated 10 percent the monthly compensation shall be $71;

(b) if and while the disability is rated 20 percent the monthly compensation shall be $133;

(c) if and while the disability is rated 30 percent the monthly compensation shall be $202;

(d) if and while the disability is rated 40 percent the monthly compensation shall be $289;

(e) if and while the disability is rated 50 percent the monthly compensation shall be $410;

(f) if and while the disability is rated 60 percent the monthly compensation shall be $516;

(g) if and while the disability is rated 70 percent the monthly compensation shall be $652;

(h) if and while the disability is rate 80 percent the monthly compensation shall be $754;

(i) if and while the disability is rated 90 percent the monthly compensation shall be $849;

(j) if and while the disability is rated as total the month compensation shall be $1,411;

TITLE 38 U.S.C.

§315. Additional compensation for dependents

Any veteran entitled to compensation at the rates provided in section 314 of this title, and whose disability is rated not less than 30 percent shall be entitled to additional compensation for dependents in the following monthly amounts:

(1) If and while rated totally disabled and--

(A) has a spouse but not child, $82;

(B) has a spouse and one or more children, $138 plus $44 for each child in excess of one;

(C) has no spouse but one or more children, $57 plus $44 for each child in excess of one;

(D) has a parent dependent upon veteran for support, then, in addition to the above amounts, $67 for each parent so dependent;

(E) notwithstanding the other provisions of this paragraph, the monthly payable amount on account of a spouse who is (i) a patient in a nursing home or (ii) helpless or blind, or so nearly helpless or blind as to need or require the regular aid and attendance of another person, shall be $149 for a totally disabled veteran and proportionate amounts for partially disabled veterans in accordance with paragraph (2) of this section; and

(F) notwithstanding the other provisions of this paragraph, the monthly amount payable on account of each child who has attained the age of eighteen years and who is pursuing a course of instruction at an approved educational institution shall be $126 for a totally disabled veteran and proportionate amounts for partially disabled veterans in accordance with paragraph (2) of this section.

(2) If and while rated partially disabled, but not less than 30 percent in an amount having the same ratio to the amount specified in paragraph (1) of this section as the degree of disability bears to total disability, the amounts payable under this paragraph, if not a multiple of $1, shall be rounded down to the nearest dollar.

TITLE 38 U.S.C.

§355. Authority for schedule for rating disabilities

The Administrator shall adopt and apply a schedule of ratings of reductions in earning capacity from specific injuries or combination of injuries. The ratings shall be based, as far as practicable, upon the average impairments of earning capacity resulting from such injuries in civil occupations. The schedule shall be constructed so as to provide ten grades of disability and no more, upon which payments of compensation shall be based, namely, 10 percent, 20 percent, 30 percent, 40 percent, 50 percent, 60 percent, 70 percent, 80 percent, 90 percent, and total, 100 percent. The Administrator shall from time to time readjust this schedule of ratings in accordance with experience.

TITLE 38 U.S.C.

§3012. Effective dates of reductions and discontinuances

(b) The effective date of a reduction or discontinuance of compensation, dependency and indemnity compensation, or pension--

(2) by reason of marriage annulment, divorce, or death of a dependent of a payee shall be the last day of the month in which such marriage, annulment, divorce, or death occurs;

TITLE 38 U.S.C.

§3101. Nonassignability and exempt status of benefits

(a) Payments of benefits due or to become due under any law administered by the Veterans' Administration shall not be assignable except to the extent specifically authorized by law, and such payments made to, or on account of, a beneficiary shall be exempt from taxation, shall be exempt from the claim of creditors, and shall not be liable to attachment, levy, or seizure by or under any legal or equitable process whatever, either before or after receipt by the beneficiary. The preceding sentence shall not apply to claims of the United States arising under such laws nor shall the exemption therein contained as to taxation extend to any property purchased in part or wholly out of such payments. The provisions of this section shall not be construed to prohibit the assignment of insurance otherwise authorized under chapter 19 of this title, or of servicemen's indemnity. For the purposes of this subsection, in any case where a payee of an educational assistance allowance has designated the address of an attorney-in-fact as the payee's address for the purpose of receiving his or benefit check and has also executed a power of attorney giving the attorney-in-fact authority to negotiate such benefit check, such action shall be deemed to be an assignment and is prohibited.

(b) This section shall prohibit the collection by setoff or otherwise out of any benefits payable pursuant to any law administered by the Veterans' Administration and relating to veterans, their estates, or their dependents, of any claim of the United States or any agency thereof against (1) any person other than the indebted beneficiary or his estate; or (2) any beneficiary or his estate except amounts due the United States by such beneficiary or his estate by reason of overpayments or illegal payments made under such laws to such beneficiary or his estate to his dependents as such. If the benefits referred to in the preceding sentence are insurance payable by reason of yearly renewable term insurance, United States Government life insurance, or National Service Life Insurance issued by the United States, the exemption provided in this section shall not apply to indebtedness existing against the particular insurance contract upon the maturity of which the claim is based,

whether such indebtedness is in the form of liens to secure unpaid premiums or liens, or interest on such premiums or liens or indebtedness arising from overpayments of dividends, refunds, loans, or other insurance benefits.

(c) In the case of a person who--

(1) has been determined to be eligible to receive pension or compensation under laws administered by the Veterans' Administration but for the receipt by such person of pay pursuant to any provision of law providing retired or retirement pay to members or former members of the Armed Forces or commissioned officers of the National Oceanic and Atmospheric Administration of of the Public Health Service; and

(2) files a waiver of such pay in accordance with section 3105 of this title in the amount of such pension or compensation before the end of the one-year period beginning on the date such person is notified by the Veterans' Administration of such person's eligibility for such pension or compensation,

the retired or retirement pay of such person shall be exempt from taxation, as provided in subsection (a) of this section, in an amount equal to the amount of pension or compensation which would have been paid to such person but for the receipt by such person of such pay.

TITLE 38 U.S.C.

§3105. Waiver of retired pay

Any person who is receiving pay pursuant to any provision of law providing retired or retirement pay to persons in the Armed Forces, or as a commissioned officer of the National Oceanic and Atmospheric Administration or of the Public Health Service, and who would be eligible to receive pension or compensation under the laws administered by the Veterans' Administration if such person were not receiving such retired or retirement pay, shall be entitled to receive such pension or compensation upon the filing by such person with the department by which such retired or retirement pay is paid of a waiver of so much of such person's retired or retirement pay as is equal in amount to such

pension or compensation. To prevent duplication of payments, the department with which any such waiver is filed shall notify the Veterans' Administration of the receipt of any such waiver, the amount waived, and the effective date of the reduction in retired or retirement pay.

TITLE 42 U.S.C.

§659. Enforcement of individual's legal obligations to provide child support or make alimony payments

(a) United States and District of Columbia to be subject to legal process.

Notwithstanding any other provision of law (including section 407 of this title) effective January 1, 1975, moneys (the entitlement to which is based upon remuneration for employment) due from, or payable by, the United States or District of Columbia (including any agency, subdivision, or instrumentality thereof) to any individual, including members of the armed services, shall be subject, in like manner and to the same extent as if the United States or the District of Columbia were a private person, to legal process brought for the enforcement, against such individual of his legal obligations to provide child support or make alimony payments.

TITLE 42 U.S.C.

§662. Definitions

For purposes of section 659 of this title--[enforcement of individual's legal obligations to provide child support or make alimony payments]

(c) The term "alimony," when used in reference to the legal obligations of an individual to provide the same, means periodic payments of funds for the support and maintenance of the spouse (or former spouse) of such individual, and (subject to and in accordance with State law) includes but is not limited to, separate maintenance, alimony pendente lite, maintenance, and spousal support; such term also includes attorney's fees, interest, and court costs when and to the extent that the same are expressly made recoverable as such pursuant to a decree, order, or judgment issued in accordance with applicable State law by a

court of competent jurisdiction. Such term does not include any payment or transfer of property or its value by an individual to his spouse or former spouse in compliance with any community property settlement, equitable distribution of property, or other division of property between spouses or former spouses.

California Civil Code

§4800(a). Division of Community Estate.

(a) Except upon the written agreement of the parties, or on oral stipulation of the parties in open court, or as otherwise provided in this section, the court shall, either in its judgment of dissolution of marriage, in its judgment decreeing the legal separation of the parties, or at a later time if it expressly reserves jurisdiction to make such a property division, divide the community estate of the parties equally. For purposes of making this division, the court shall value the assets and liabilities as near as practicable to the time of trial, except that, upon 30 days' notice by the moving party to the other party, the court for good cause shown may value all or any portion of the assets and liabilities at a date after separation and prior to trial to accomplish an equal division of the community estate of the parties in an equitable manner.

For the purposes of division and in confirming or assigning the liabilities of the parties for which the community estate is liable, the court shall characterize liabilities as separate or community and confirm or assign them to the parties in accordance with subdivision (c).

As used in this section, "community estate" includes both the community and quasi-community assets and liabilities of the parties.

California Rules of Court

Rule 28. Review by the Supreme Court

(e) [Form of petition, answer, and reply]

(1) Except as provided in this rule, the petition, answer and reply shall, insofar as practicable, conform to the provisions of rule 15.

(2) At the beginning of the body of the petition, the petitioner shall state the issues presented for review, expressed in the terms and

circumstances of the case but without unnecessary detail. The statement should be short and concise and should not be argumentative or repetitious. The statement of an issue will be deemed to comprise every subsidiary issue fairly included in it. Only the issues set forth in the petition and answer or fairly included in them need be considered by the court.

(3) The petition shall be as concise as possible, and shall address, in particular, why the cause is appropriate for review under the criteria stated in rule 29.

(4) Each copy of the petition shall contain or be accompanied by a copy of the opinion of the Court of Appeal, showing tne date of filing.

(5) The petition shall be a single document including a brief in support of the request for review. All contentions in support of the petition shall be included, including all legal authorities and argument. If a party files an answer to the petition, it shall be a single document which includes all contentions in opposition to the petition.

The answer of a party opposing review may request the court to consider additional issues if review is granted as to any or all issues raised in the petition. An answer stating additional issues shall conform to the requirements of paragraph (2).

No authorities or argument may be incorporated by reference from another document into the petition, answer or reply, but the petition, answer or reply may incorporate by reference specified portions of a petition for review, answer or reply filed in the Supreme Court by another party in the same case, or filed in the Supreme Court in a connected case wherein a petition for review is also pending or has been granted. No discussion of authorities or argument, however denominated, may be annexed to or filed with the petition, answer or reply, unless the annexed material is page-numbered consecutively with the body of the petition, answer or reply and the total length, including the annexed material, does not exceed the limit established in paragraph (6).

(6) A petition or answer shall not exceed 25 pages if printed or 30 pages if typewritten or produced by other process of duplication, exclusive of the Court of Appeal opinion, index of contents and table of authorities, and any other indices. A reply shall not exceed 10 pages if

printed or 15 pages if typewritten or produced by other process of duplication, exclusive of index of contents and table of authorities.

There shall be no exhibits or appendices, however denominated, annexed to or filed with a petition, answer, or reply other than (i) the opinion of the Court of Appeal; (ii) any trial court order as to which relief is sought; (iii) any annexed material permitted by subdivision (5); and (iv) any evidentiary exhibit or order of a trial court that counsel considers of unusual significance and that does not exceed 10 pages. In all other instances, reference to evidentiary matters and trial court orders shall be by appropriate reference to the record transmitted from the Court of Appeal to the Supreme Court. The Chief Justice may permit petitions, answers, or replies of greater length, or the inclusion of more annexed material, upon written application.

(7) Proof of service of the petition shall name each party represented by each attorney served. A petition accompanied by a defective proof of service shall be filed, but if a proper proof of service is not filed within five days, the court may strike the petition or impose a lesser sanction.

California Rules of Court

Rule 977. Citation of unpublished opinions prohibited; Opinions ordered published by Supreme Court

(a) [Unpublished opinions) An opinion that is not ordered published shall not be cited or relied on by a court or a party in any other action or proceeding except as provided in subdivision (b).

(b) [Exceptions] Such an opinion may be cited or relied on:

(1) when the opinion is relevant under the doctrines of law of the case, res judicata, or collateral estoppel; or

(2) when the opinion is relevant to a criminal or disciplinary action or proceeding because it states reasons for a decision affecting the same defendant or respondent in another such action or proceeding.

(c) [Citation procedure] A copy of any opinion citable under subdivision (b) shall be furnished to the court and all parties by attaching it to the document in which it is cited, or, if the citation is to be made orally, within a reasonable time in advance of citation.

(d) [Opinions ordered published by Supreme Court] An opinion of the Court of Appeal ordered published by the Supreme Court pursuant to rule 976 is citable.[1]

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1. Any citation to the Court of Appeal opinion shall include reference to the grant of review and any subsequent action by the Supreme Court.

Supreme Court, U.S.
FILED
JUN 25 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-1849

In The

Supreme Court of the United States

October Term, 1990

GERALD E. MANSELL,

Petitioner,

v.

GAYE M. MANSELL,

Respondent.

On Petitions for Writs of Certiorari or Mandamus to the California Court of Appeal, Fifth District, or for Entry of Judgment

RESPONDENT'S BRIEF IN OPPOSITION TO PETITIONS FOR WRITS OF CERTIORARI, OR MANDAMUS, OR FOR ENTRY OF JUDGMENT

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QUESTION PRESENTED FOR REVIEW

The question presented for review by the Petition for Writs of Mandamus or Certiorari should properly be phrased as follows:

Does the United States Supreme Court have jurisdiction to set aside a state court judgment which is based on the doctrine of res judicata after the Petitioner failed to file an appeal or motion to set aside the judgment within the statutory time limits and/or where the Petitioner failed to show grounds of mutual mistake of law as set forth by California law?

LIST OF PARTIES

PETITION FOR WRIT OF MANDAMUS OR ENTRY OF JUDGMENT:

Petitioner, Gerald E. Mansell

Respondent, Court of Appeal of California, Fifth Appellate District; the Honorable James Ardaiz, William Stone, and George Brown, Justices of the Court of Appeal of California, Fifth Appellate District

PETITION FOR WRIT OF CERTIORARI:

Petitioner, Gerald E. Mansell

Respondent, Gaye M. Mansell

OTHER

Attorney General of the State of California

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STATUTES INVOLVED

The only statute actually involved in this matter is California Civil Code of Procedure § 473, which applicable parts are set forth in full at Appendix A.

STATEMENT OF THE CASE

Respondent (hereafter "WIFE") disputes Petitioner's (hereafter "HUSBAND") Statement of the Case in his Petition and therefore sets forth the following pertinent facts:

1. HUSBAND and WIFE signed a stipulated settlement agreement which was incorporated into the judgment in 1979.

2. Both parties were represented by counsel.

3. HUSBAND did not take an appeal against the judgment.

4. HUSBAND did not file a motion to vacate the judgment within the time limits set forth in California Code of Civil Procedure § 473.

5. HUSBAND filed a motion to modify the judgment based upon equitable grounds in 1983, and that motion was denied.

6. The California Fifth District Court of Appeal (hereafter "5th DCA") affirmed the trial court's decision in 1987 and the California Supreme Court denied review (the first opinion hereafter referred to as *"Mansell I"*).

7. This Court reversed and remanded on May 30, 1989, and in its opinion stated the issue of res judicata was an independent state ground over which it held no jurisdiction.

8. The 5th DCA issued its second opinion, *Mansell v Mansell,* 216 CA3d 937, 265 CR 227 (1989), modified 217 CA3d 219 (1990) (hereafter *"Mansell II"*) on December 18, 1989, clarifying its original opinion which discussed the federal question, stating the resolution of the federal question was unnecessary to find the judgment could not be reopened for modification since:

a) it was a *pre-McCarty* judgment *(McCarty v McCarty,* 453 U.S. 210 (1981) and

b) HUSBAND failed to establish a mutual mistake of law which might have justified granting his motion, thus, HUSBAND'S motion was barred by res judicata.

9. The California Supreme Court denied HUSBAND'S request for hearing on March 29, 1990.

10. Garnishment of HUSBAND'S disability pension has never been in effect at anytime in this proceeding.

HUSBAND states in his Petition, at page 6, WIFE failed to preserve her objections to HUSBAND'S standing to seek review under California Rule of Court 28(e)(5). *Mansell II* addressed this contention and found it had no merit.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRITS OF MANDAMUS OR CERTIORARI

I

NO REVIEWABLE QUESTION IS PRESENTED

HUSBAND had three remedies available to avoid the judgment in question. He could have:

1. filed an appeal from the judgment.

2. filed a motion to vacate or modify the judgment within six months after entry of the judgment pursuant to California Code of Civil Procedure § 473.

3. filed a motion to vacate or modify the judgment upon equitable grounds showing extrinsic fraud or mutual mistake of law. *In re Marriage of Stevenot,* 154 CA3d 1051, 202 CR 116 (1984).

HUSBAND failed to file an appeal against the 1979 judgment, failed to file a motion to vacate the 1979 judgment within the statutory time limits, and failed to show a mutual mistake of law (the only equitable ground he asserted) which would justify modification of a four year old judgment incorporating a stipulated agreement voluntarily signed by HUSBAND.

Just as in his original Jurisdictional Statement bringing *Mansell v. Mansell,* (No. 87-201) ___ U.S. ___, 109 S.Ct. 2023 (May 30, 1989), before this Court in 1987, HUSBAND has again failed to mention to this Court the judgment was based upon a *stipulated* property settlement.

II

THE PETITION DOES NOT SHOW UNITED STATES SUPREME COURT JURISDICTION

The Petition does not request this Court to take jurisdiction regarding the opinion of the trial court or *Mansell*

I. The Petition challenges *Mansell II* which is based on this Court's own conclusion it has no jurisdiction if, after remand, the 5th DCA decided this matter on a finding of res judicata. (See *Mansell v Mansell*, supra, at footnote 5. Also see the "Official Transcript of Proceedings Before the United States Supreme Court, *Mansell v. Mansell*, January 10, 1989", page 33, line 12 through page 35, line 24, especially at page 35, lines 3 through 8, included at Appendix B). *Mansell II* addresses no federal question, it does not deal with the merits of any federal question, it does not deal with garnishment of disability pay.

The finding of *Mansell II* is the trial court did not abuse its discretion in 1983 by refusing to reopen the judgment due to the independent state ground of res judicata. Res judicata is based on HUSBAND'S failure to file an appeal or motion to vacate within the statutory time limits and failure to show mutual mistake of law.

Mansell II plainly states since this is a pre-*McCarty* case, and California courts have not made *McCarty* retroactive, the judgment is final. Thus, whether California courts correctly or incorrectly interpreted federal law two years before *McCarty*, HUSBAND made no showing of mutual mistake and the case rests on res judicata. Even if *McCarty* had been retroactive, HUSBAND waited to file his motion two years after it came into being.

HUSBAND seeks this Court's assistance in evading his responsibility of abiding by a judgment based upon a stipulated property settlement signed and entered four years before he ever sought to vacate it.

III

ON REMAND, A STATE APPELLATE COURT MAY APPLY LAWS BASED SOLELY UPON INDEPENDENT STATE GROUNDS

This Court has previously remanded cases back to state courts which issued rulings based upon independent state grounds thus upholding their original rulings on different grounds [See *Paschal v Christie-Stewart, Inc.*, 414 U.S. 193 (1973); *Kirkpatrick v Christian Homes of Abilene, Inc.*, 460 U.S. 1074 (1983)]. As stated above, this Court has invited California to do the same, both in its statements during oral arguments and in its opinion.

IV

MANSELL II STATED WIFE WAS NOT PRECLUDED FROM RAISING RES JUDICATA ON REMAND DESPITE CALIFORNIA RULE OF COURT 28(e)(5)

Common sense and *Mansell II* dictate WIFE was not required to expend more time and money cross-appealing an issue after she had won, regardless of California Rule of Court 28(e)(5) (See Petition, page 6). Indeed, nothing prohibits California courts from addressing an issue whether or not raised by the parties. As *Mansell II* stated, this is an advisory rule for the courts. WIFE is aware of no conceivable federal question relating to this matter.

California makes its own rules governing purely state actions. This Court has no jurisdiction to tell California how to interpret its own Rules of Court having no effect on federal issues as HUSBAND implies.

V

38 U.S.C. 3101 IS NOT AT ISSUE IN *MANSELL II*

As stated previously, *Mansell II* rests entirely on the independent state ground of res judicata. Therefore 38 U.S.C. 3101 is not before this Court as claimed by HUSBAND.

HUSBAND raised this statute in *Mansell I*, *Mansell v Mansell*, and now in *Mansell II*. The California courts, this Court, and even the Solicitor General in his amicus brief filed in *Mansell v Mansell* on behalf of HUSBAND have stated this case can be resolved without ever addressing this argument, yet HUSBAND insists on raising a long dead issue.

Dated: June 25, 1990

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APPENDIX A

California Code of Civil Procedure § 473 (at Paragraph 3):

> "The court may, upon such terms as may be just, relieve a party of his or her legal representative from a judgment, order, or other proceeding taken against him or her through his or her mistake, inadvertence, surprise, or excusable neglect. Application for such relief must be accompanied by a copy of the answer or other pleading proposed to be filed therein, otherwise the application shall not be granted, and must be made within a reasonable time, in no case exceeding six months, after such judgment, order, or proceeding was taken; provided, however, that, in the case of a judgment, order or other proceeding determining the ownership or right to possession of real or personal property, without extending the six-month period, when a notice in writing is personally served within the State of California both upon the party against whom the judgment, order or other proceeding has been taken, and upon his or her attorney of record, if any, notifying said party and his or her attorney of record, if any, that such order, judgment or other proceeding was taken against him or her and that any rights said party has to apply for relief under the provisions of Section 473 of the Code of Civil Procedure shall expire 90 days after service of said notice, then such application must be made within 90 days after service of such notice upon the defaulting party or his or her attorney of record, if any, whichever service shall be later. No affidavit or declaration of merits shall be required of the moving party. Notwithstanding any other requirements of this section, the court shall, whenever an application for relief is timely, in proper form,

and accompanied by an attorney's sworn affidavit attesting to his or her mistake, inadvertence, surprise or neglect, vacate any resulting default judgment entered against his or her client unless the court finds that the default was not in fact caused by the attorney's mistake, inadvertence, surprise, or neglect. The court shall, whenever relief is granted based on an attorney's affidavit of default, direct the attorney to pay reasonable compensatory legal fees and costs to opposing counsel or parties.

APPENDIX B

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE
THE SUPREME COURT
OF THE
UNITED STATES

CAPTION: GERALD E. MANSELL, Appellant V. GAYE (MANSELL) FORBES

CASE NO: 87-201

PLACE: WASHINGTON, D.C.

DATE: January 10, 1989

PAGES: 1 thru 51

* * *

(p. 33) before the California Supreme Court.

That was an enabling statute. And so if the – for example, if you rule in favor of Major Mansell you will not only be guaranteeing him his disability benefits, because the relief he is specifically requesting is that that entire enabling paragraph be eliminated.

So Gaye Mansell would receive nothing. No longevity, no disability. And he is asking that you do this four years, now ten years after the entry of the agreement and the judgment.

QUESTION: But why – there doesn't seem to be anything in the California decision saying that this can't be reopened.

MR. CORNELL: There was nothing in the California decision on – yes, that said it could be reopened. There

was nothing there that said it could or could not be reopened.

What the California Court of Appeal did was rule on the appeal. They didn't say that it was barred by res judicata. They didn't say it would not be barred by res judicata.

QUESTION: You're really saying that there is a way that you could win this case but on a ground the court below didn't use.

(p. 34) MR. CORNELL: Yes.

QUESTION: Please affirm on the grounds of res judicata.

MR. CORNELL: Yes. And if this Court rules contrary to me, I believe I can return to that court and have a ruling on that.

The fact that they did not rule on that basis doesn't mean –

QUESTION: Well, the court below disposed of it on – disposed of it on this other ground, though, that, that California can – can – needn't take that – can disregard the waiver of the retirement pay.

MR. CORNELL: Yes.

QUESTION: Which really is a ruling on the merits. You would think that, if the California Court of Appeal thought that res judicata were appropriate, they would not have reached the merits.

MR. CORNELL: I don't know. I can't speculate as to why they did or did not.

QUESTION: Does California have a rule that they do not reach federal or Constitutional questions unless there's necessity to do so?

MR. CORNELL: I'm not aware of such a rule. There is a clear rule in California, the judgments final before the effective date of McCarty are not reopenable, (p. 35) and are subject to res judicata. And I have cited those in the briefs.

QUESTION: In any case, that's a state law question. Why should we decide the state law question of whether this is res judicata or not? Why can't we just decide the federal law question and, as you say, if it is res judicata, the California court will say so, when it's sent back.

MR. CORNELL: If there's an express reservation to that effect in the opinion of the Court, then I think it would be appropriate.

However, if there isn't, then what you've done is say that all of the judgments that were entered prior to the McCarty decision are now wide open and subject to relitigation, and all agreements are set aside.

QUESTION: (Inaudible) if we decide on the merits, you may win.

MR. CORNELL: I would certainly hope so, Your honor. That's why I'm here.

QUESTION: Did you argue res judicata to the California Court of Appeal?

MR. CORNELL: Yes. I did.

QUESTION: And they said nothing about it?

MR. CORNELL: They said nothing about it. Now, what is the third interest here that's before you

* * *

Supreme Court, U.S.
FILED
JUL 10 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-1849

SUPREME COURT OF THE UNITED STATES

October Term, 1990

In re GERALD E. MANSELL

GERALD E. MANSELL, *Petitioner*,
v.
GAYE M. MANSELL, *Respondent*

Petition for Writs of Mandamus or Certiorari to the Court of Appeal of California, Fifth Appellate District, and the Honorable James Ardaiz, William Stone, and George Brown, Justices of the Court of Appeal of California, Fifth Appellate District, or
for
Entry of Judgment by this Court

Reply to Brief in Opposition to Petition for Writs of Mandamus, Certiorari, or for Entry of Judgment

---

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QUESTIONS PRESENTED

1. Whether California's "reinterpretation" of its original opinion is a sophistic subterfuge to disobey this Court's mandate, to evade this Court's jurisdiction, and to usurp federal jurisdiction and divide Petitioner's Veterans Administration Disability Benefits without subject matter jurisdiction.

2. Whether California's non-compliance with this Court's mandate should be remedied through entry of judgment by this Court.

3. Whether California may characterize and divide Veterans Administration Disability Benefits as community property upon dissolution of marriage despite the anti-attachment protections of 38 U.S.C. §3101, which positively require by direct enactment that the disabled veteran actually receive the benefits.

PARTIES

a. Petition for writ of mandamus or entry of judgment:

GERALD E. MANSELL, *Petitioner*, and
THE COURT OF APPEAL OF CALIFORNIA, FIFTH APPELLATE DISTRICT, and the Honorable JAMES ARDAIZ, WILLIAM STONE, and GEORGE BROWN, Justices of the Court of Appeal of California, Fifth Appellate District, *Respondents*.

b. Petition for writ of Certiorari:

GERALD E. MANSELL, *Petitioner*,
GAYE M. MANSELL, *Respondent*.

c. Since Petitioner contends that application of California Civil Code §4800(a) to divide his Veterans Administration disability compensation as community property offends Art. VI of the United States Constitution, 28 U.S.C. §2403(b) may be applicable, and the Attorney General of the State of California is being served pursuant to Rule 29.4(c) of this Court.

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I
THE BRIEF IN OPPOSITION MISREPRESENTS CALIFORNIA LAW BY CLAIMING THAT COLLATERAL REMEDIES ARE NOT AVAILABLE

Respondent contends that only three remedies are available in California to attack final judgments (Opposition Brief [Opp], page 1 & 3). However, Respondent did not provide this Court with the entire text of California Code of Civil Procedure §473. What Respondent conspicuously omitted from her version of the statute is the last paragraph, which provides, in relevant part:

> "The court * * * * may, on motion of either party after notice to the other party, **set aside any void judgment or order."**

Respondent's failure to provide the court with the entire relevant text of the statute is another disingenuous, but simplistic attempt to avoid the federal question concerning preemption of subject matter jurisdiction by 38 U.S.C. §3101. She and the California courts have done this throughout the entire history of this case.

Nevertheless, Respondent concedes that Major Mansell has preserved the issue at every stage of the proceedings (Opp, 6).

II
THE PETITION IS APPROPRIATE BECAUSE *RES JUDICATA* DOES NOT PRECLUDE COLLATERAL ATTACKS ON JUDGMENTS THAT ARE VOID FOR WANT OF SUBJECT MATTER JURISDICTION

In its second opinion (Petition, App.G), the California Court of Appeal unequivocally acknowledged that California law allows collateral attack on judgments that are void for want of subject matter jurisdiction.

> "As we have indicated *ante,* Husband contends the instant judgment was void for want of subject matter jurisdiction. This contention, if true, would be a **proper basis for attacking the judgment** (emphasis added, Petition, App.G, page 8).

Nevertheless, the Court of Appeal refused to address Major Mansell's jurisdictional challenge based on 38 U.S.C. §3101. However, under the Supremacy Clause of the United States Constitution, Article VI, the states are required to acknowledge and enforce federal statutes (*Testa v. Katt*, 330 U.S. 386 (1947); *Miller v. Municipal Court*, 22 Cal.2d 818, 841, 851 (1943)).

III
THE JUDGMENT IS VOID BECAUSE STATE SUBJECT MATTER JURISDICTION OVER VETERANS' DISABILITY BENEFITS IS ABSOLUTELY PREEMPTED BY 38 U.S.C §3101

A state divorce decree, like other law governing the economic aspects of domestic relations, must give way to

clearly conflicting federal enactments (*Ridgway v. Ridgway,*, 454 U.S. 46, 54-55 (1981)). In the present case, Major Mansell, as a recipient of V.A. disability benefits, is fully protected by the anti-attachment provisions of the Veterans' Benefits Act (38 U.S.C. §3101), which shields V.A. disability benefits from every form of legal process, except for child support (*Rose v. Rose*, 481 U.S. 619, n.6 (1987)).

Section 3101(a) provides, in relevant part:

> (a) "[V.A. disability benefits] **shall not be liable to attachment, levy, or seizure by or under any legal or equitable process whatever, either before or after receipt by the beneficiary.** ****".(*emphasis added.*)

It is difficult to envision a clearer expression of congressional intent to preempt state subject matter jurisdiction. Therefore, California courts have no power to deal with V.A. disability benefits.

Since the present judgment orders distribution of Major Mansell's V.A. disability benefits to his former wife, it violates §3101 and is therefore void for lack of subject matter jurisdiction and is subject to this collateral attack.

CONCLUSION

For these reasons, a Writ of Mandamus should issue, directed to the California Court of Appeal, Fifth Appellate District and the Honorable James Ardaiz, William Stone, and George Brown, Justices of the Court of Appeal, directing that judgment be entered declaring that

petitioner's Veterans Administration disability compensation is his separate property; or

This Court should enter final judgment declaring that petitioner's Veterans Administration disability compensation is his separate property; or

A Writ of Certiorari should issue, directed to the California Court of Appeal, Fifth Appellate District, for consideration of whether petitioner's Veterans Administration disability compensation is protected from community property division upon dissolution of marriage by 38 U.S.C. §3101.

Respectfully Submitted,

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June, 1990.

APPENDIX

California Code of Civil Procedure §473.
Amending Pleadings--Continuance--Relief from Mistake, Inadvertence, Surprise or Excusable Neglect; Time Limit; Affidavit of Merits Not Required--Correcting Clerical Errors--Setting Aside Void Judgments or Orders.

The court may, in furtherance of justice, and on such terms as may be proper, allow a party to amend any pleading or proceeding by adding or striking out the name of any party, or by correcting a mistake in the name of a party, or a mistake in any other respect; and may, upon like terms, enlarge the time for answer or demurrer. The court may likewise, in its discretion, after notice to the adverse party, allow, upon such terms as may be just, an amendment to any pleading or proceeding in other particulars; and may upon like terms allow an answer to be made after the time limited by this code.

When it appears to the satisfaction of the court that such amendment renders it necessary, the court may postpone the trial, and may, when such postponement will by the amendment be rendered necessary, require, as a condition to the amendment, the payment to the adverse party of such costs as may be just.

The court may, upon such terms as may be just, relieve a party or his or her legal representative from a judgment, order, or other proceeding taken against him or her

through his or her mistake, inadvertence, surprise, or excusable neglect. Application for such relief must be accompanied by a copy of the answer or other pleading proposed to be filed therein, otherwise the application shall not be granted, and must be made within a reasonable time, in no case exceeding six months, after such judgment, order or proceeding was taken; provided, however, that in the case of a judgment, order or other proceeding determining the ownership or right to possession of real or personal property, without extending the six-months period, when a notice in writing is personally served within the State of California both upon the party against whom the judgment, order or other proceeding has been taken, and upon his or her attorney of record, if any, notifying said party and his or her attorney of record, if any, that such order, judgment or other proceeding was taken against him or her and that any rights said party has to apply for relief under the provisions of Section 473 of the Code of Civil Procedure shall expire 90 days after service of said notice, then such application must be made within 90 days after service of such notice upon the defaulting party or his or her attorney of record, if any, whichever service shall be later. No affidavit or declaration of merits shall be required of the moving party. Notwithstanding any other requirements of this section, the court shall, whenever an application for relief is timely, in proper form, and accompanied by an attorney's sworn affidavit attesting to his or her mistake, inadvertence, surprise or neglect, vacate any resulting default judgment entered against his or her client unless

the court finds that the default was not in fact caused by the attorney's mistake, inadvertence, surprise or neglect. The court shall, whenever relief is granted based on an attorney's affidavit of fault, direct the attorney to pay reasonable compensatory legal fees and costs to opposing counsel or parties.

Whenever the court grants relief from default judgment based on any of the provisions of this section, the court may: (1) impose a penalty of no greater than one thousand dollars ($1,000) upon an offending attorney or defaulting party, (2) direct that an offending attorney pay an amount no greater that one thousand dollars ($1,000) to the State Bar Client Security Fund or (3) grant such other relief as is appropriate.

The court may, upon motion of the injured party, or its own motion, correct clerical mistakes in its judgment or orders as entered, so as to conform to the judgment or order directed, and may, on motion of either party after notice to the other party, set aside any void judgment or order.